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Privacy Laws and Privacy Levers: Online Surveillance versus Economic Development in the People's Republic of China

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**Privacy Laws and Privacy Levers: Online
Surveillance Versus Economic Development in the
People’s Republic of China**

ANN BARTOW*

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I. INTRODUCTION

This Essay describes and contextualizes the ongoing efforts by the Communist Party of China (CPC) to reconcile two dramatically competing interests: the desire to extensively monitor the communications of its citizenry, and a burning ambition to further develop its banking and financial industries, its high tech innovation capabilities, and its overall share of the “knowledge economy.”

Monitoring and censoring communications, especially via “one-to-many” social networking platforms, is viewed as essential for the prevention of mass anti-Party political activities ranging from peaceful civil disobedience to armed insurrection and for the protection of the reputations of individual Party leaders. Mobile Internet technologies make electronic surveillance easier, but effective monitoring harder, as keeping track of the content and importance of individual

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communications requires time and trustworthy judgment calls that cannot be automated or outsourced.

While unbounded surveillance may be a useful tool for keeping control of political subdivisions, it can be very bad for business. Companies want to protect their trade secrets, and control access to their financial data and other proprietary information, and they want to engage in confidential communications. Businesses also want access to the same information and Internet resources as their competitors abroad. The people running China would like to attract and retain all manner of sophisticated business ventures, but simultaneously wish to spy extensively on these companies and on the people who run them. And the Internet access that is generally available is censored and ponderously slow due to the extensive monitoring and filtering technologies that are in place.

The CPC probably can't have it both ways. If secure communication channels are not consistently available to private sector businesses within China, enterprises that value or require confidentiality will limit their in-country transactions. Some foreign companies may avoid doing business there altogether. But permitting credibly unmonitored and unfiltered communications on a scale commensurate with the size of the business community in China will not be a step the CPC takes lightly. Monitoring and censoring communications, especially via "one-to-many" social networking platforms, is viewed as essential for the prevention of mass anti-Party political activities ranging from peaceful civil disobedience to armed insurrection; and to protect the reputations of individual Party leaders.

II. PRIVACY LAW AND PRAXIS IN CHINA

China is often externally perceived as a nation with an autocratic government that does not permit its citizens any realistic expectation of personal privacy. Yet just as Western conceptions of privacy differ across variables such as age, gender, social class, and other factors, there may be an even wider range of variation in China, given its long and complicated history, geographical range, enormous population, and substantial ethnic diversity.¹ As of 2005 there were more than 200 laws or regulations in China that mentioned privacy in some form.² At the level of written laws and regulations China's approach to privacy is actually far more robust and somewhat less incoherent than that of the United States. There is no need to search the Chinese Constitution for textual privacy penumbras or emanations.³ This document, which took effect in

¹ Bonnie S. McDougall, *Particulars and Universals: Studies on Chinese Privacy*, in CHINESE CONCEPTS OF PRIVACY 3, 4 (Bonnie S. McDougall & Anders Hansson eds., 2002).

² Cao Jingchun, *Protecting the Right to Privacy in China*, 36 VICTORIA U. WELLINGTON L. REV. 645, 646 (2005).

³ See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations

1982, explicitly establishes a right of personal dignity that prohibits insults, libel and defamation, a right to be free of unlawful searches or intrusion into the home, and a right of freedom and privacy with respect to personal correspondence.⁴ Of particular relevance to the topic of this essay is Article 40, which states:

Freedom and privacy of correspondence of citizens of the People's Republic of China are protected by law. No organization or individual may, on any ground, infringe upon the freedom and privacy of citizens' correspondence except in cases where, to meet the needs of state security or of investigation into criminal offences, public security or procuratorial organs are permitted to censor correspondence in accordance with procedures prescribed by law.⁵

China's General Civil Code (1986) also contains several provisions that relate to privacy concerns, including:

Article 99. Citizens shall enjoy the right of personal name and shall be entitled to determine, use or change their personal names in accordance with relevant provisions. Interference with, usurpation of and false representation of personal names shall be prohibited. Legal persons, individual businesses and individual partnerships shall enjoy the right of name. Enterprises as legal persons, individual businesses and individual partnerships shall have the right to use and lawfully assign their own names.

Article 100. Citizens shall enjoy the right of portrait. The use of a citizen's portrait for profit without his consent shall be prohibited.

Article 101. Citizens and legal persons shall enjoy the right of reputation. The personality of citizens shall be protected by law, and the use of insults, libel or other means to damage the reputation of citizens or legal persons shall be prohibited.

Article 102. Citizens and legal persons shall enjoy the right of honor. It shall be prohibited to unlawfully divest citizens and legal persons of their honorary titles.⁶

The importance of Article 101 protection of "reputation rights" in particular was emphasized by two judicial interpretations of the Supreme Court of China, one in 1993 and another in 1998,⁷ and is often invoked in business litigation.⁸

from those guarantees that help give them life and substance. Various guarantees create zones of privacy." (citation omitted)).

⁴ XIANFA [CONSTITUTION] arts. 38, 39 (1982) (China).

⁵ *Id.* art. 40.

⁶ General Principles of the Civil Law of the People's Republic of China (promulgated by Order No. 37 of the President of the People's Republic of China, Apr. 12, 1986, effective Jan. 1, 1987) (Lawinfochina) (China), available at http://www.law.yale.edu/rcw/rcw/jurisdictions/ase/china/PRC_Civ_Law_Gen Prin.doc.

⁷ See Interpretation of the Supreme People's Court on Several Issues About the Trial of Cases Concerning the Right of Reputation (promulgated by Judicial Interpretation No. 26, July 14, 1998, effective Sept. 15, 1998) (Lawinfochina) (China), available at

But focusing on the words of the Chinese Constitution and of the General Civil Code does not well facilitate an understanding of how the Chinese legal system actually operates.⁹ In practice, “meet[ing] the needs of state security”¹⁰ results in a whole lot of infringement of freedom and privacy, and censorship. Article 40, like much of the Chinese Constitution, is more aspirational than descriptive. The disconnect between enumerated constitutional rights and the lived reality of Chinese people is most powerfully illustrated by Article 35, which asserts that Chinese citizens “enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.”¹¹ In practice these freedoms are extremely circumscribed. Written laws and official practices unsubtly fetter these freedoms substantially. So do unofficial government practices and longstanding social norms. One Chinese literary scholar has noted that “peepholes and eavesdropping are common devices in traditional Chinese narrative.”¹² Chinese citizens participate in a culture of peer observation and orchestrated scrutiny.

A. China's Government, Legal System, and Privacy Control

The official structure of the Chinese government was established by the current (1982) Chinese Constitution.¹³ The National People's Congress of the People's Republic of China is the highest organ of state power.¹⁴ Its permanent body is the Politburo Standing Committee of the National People's Congress.¹⁵ The National People's Congress and its Standing Committee exercise the legislative powers of the state, and also powers that in the United States are

<http://www.lawinfochina.com/display.aspx?lib=law&id=6673> (discussing the Answers to Some Problems on the Trial of Cases Concerning the Right of Reputation judicial interpretation in 1993).

⁸ See, e.g., Stan Abrams, *Beijing University Files Suit over Sex Scandal Allegations*, CHINA HEARSAY (Sept. 3, 2012), <http://www.chinahearsay.com/beijing-university-files-suit-over-sex-scandal-allegations/>; Shaun Rein, *In China, Reputation Rules*, FORBES (Sept. 23, 2009, 2:56 PM), <http://www.forbes.com/2009/09/23/china-reputation-government-leadership-managing-rein.html>; *Shanghai Court Hears Michael Jordan Suit*, CHINA DAILY, http://www.chinadaily.com.cn/business/2013-04/28/content_16458116.htm (last updated Apr. 28, 2013).

⁹ See Donald C. Clarke, *Empirical Research into the Chinese Judicial System*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 164, 181 (Erik G. Jensen & Thomas C. Heller eds., 2003).

¹⁰ XIANFA art. 40 (1982) (China).

¹¹ *Id.* art. 35.

¹² Cathy Silber, *Privacy in Dream of the Red Chamber*, in CHINESE CONCEPTS OF PRIVACY, *supra* note 1, at 55, 56.

¹³ See *The World Factbook: China*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (last updated Aug. 22, 2013).

¹⁴ See Melanie Hart, *China Selects Its 7 New Leaders*, CENTER FOR AM. PROGRESS (Nov. 16, 2012), <http://www.americanprogress.org/issues/china/news/2012/11/16/45166/china-selects-its-7-new-leaders/>.

¹⁵ *Id.*

prerogatives of our executive and judicial branches of government. The Standing Committee is comprised of seven members, one of whom is designated the Communist Party Chief.¹⁶ As of October 2013, that role is filled by Xi Jinping, who replaced Hu Jintao, and who also succeeded Hu Jintao as President of China in March of 2013.¹⁷ Like previous top Chinese government executives, Xi Jinping is the public face of China and holds tremendous power. The other high-profile Chinese leader in China, subordinate only to the Party Chief/President, is the Premier of the State Council.¹⁸ This office is currently held by the former Vice Premier Li Keqiang, who replaced Wen Jiabao in March 2013.¹⁹ Though none of these four immensely powerful men ever stood for popular election, their status and authority derive in part from their name recognition and reputations among the Chinese citizenry. Just as American politicians will sometimes assert that criticism of them is “bad for the country,” Chinese leaders frame criticism of themselves as potentially destabilizing attacks on the CPC. Unlike American politicians, Chinese leaders can actively control what is said about them with imperfect, but still meaningful, effectiveness.

Informally, the communicative restrictions under which Chinese people live their lives are openly acknowledged by people within the CPC hierarchy, often with the explanation that “China just has too many people” to make broader expressive freedoms a realistic possibility. The mechanisms of control are many and are deployed top down, bottom up and horizontally.²⁰ Top down communicative control is mandated by the central government, which sets policy but delegates most of the mechanics of the actual control infrastructure to the CPC-affiliated leadership of the provincial governments, with the oversight of the national CPC hierarchy. Bottom up and horizontal control comes from ordinary people looking to maintain or improve their economic and social status by engaging in active surveillance of those around them, as part of their jobs, or on a volunteer basis.

One of the most startling moments of the first class I taught in China came when several students introduced themselves as my “course monitors.” These were voluntary positions that brought them some small measure of recognition and prestige within the University and possibly within the CPC. My course monitors were always there to help me; willing to make photocopies; insure that I always had tea, chalk and an eraser; distribute Powerpoint slides; and make

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See generally Max Fisher, *Chinese Government Officials Are Constantly Wiretapping and Spying on One Another*, WASH. POST, Feb. 19, 2013, <http://www.washingtonpost.com/blogs/worldviews/wp/2013/02/19/chinese-government-officials-are-constantly-wiretapping-and-spying-on-one-another/>; Frank Langfitt, *In China, Beware: A Camera May Be Watching You*, NPR (Jan. 29, 2013, 3:30 AM), <http://www.npr.org/2013/01/29/170469038/in-china-beware-a-camera-may-be-watching-you>.

sure I knew when the Chinese holidays were. They also recorded and took copious notes of my lectures for reasons both related and unrelated to the final examination. I also always had Chinese faculty members sitting in on my classes, for which they received teaching credit. My Fulbright orientation taught me to expect this because the CPC is very suspicious of foreigners, especially those employed by the U.S. State Department as I was.²¹

Law schools are particularly sensitive about outside influences. The CPC has far less sway over industry and commerce than it used to. Two places where the Party still retains powerful control are China's public universities and China's legal system. Chinese law schools sit at the intersection of both, so they are institutions where Party loyalty is particularly emphatically fostered and policed. At Tongji University Law School, students are required to take a political indoctrination class to learn about the genius of Deng Xiaoping and his "Reform and Opening" innovations, which led to the current economic system of "Capitalism with Chinese Characteristics." Atypically for courses at Tongji, attendance was taken at every class meeting.

Chinese academics are also scrutinized. The English-language press has reported that Chinese faculty members are counseled not to lecture about or discuss "the seven unmentionables" in their classrooms; the forbidden topics include universal values, freedom of the press, civil society, human rights, the Communist Party's historical errors, the rich elite, and judicial independence.²² And their lectures are monitored. According to a recent NPR report:

²¹ For a fascinating account of university teaching in China, see generally AMY WERBEL, *LESSONS FROM CHINA: AMERICA IN THE HEARTS AND MINDS OF THE WORLD'S MOST IMPORTANT RISING GENERATION* (2013).

²² Willy Lam, *China's Reform Hands Fail To Clap*, ASIA TIMES ONLINE, <http://www.atimes.com/atimes/China/CHIN-02-240513.html> (last visited Sept. 26, 2013) ("Xi, who is also president and commander-in-chief, indicated soon after taking power at the 18th Chinese Communist Party (CCP) Congress last November that party authorities will do whatever it takes to firm up the people's 'self-confidence in the road' (*daolu zixin*) of socialism with Chinese characteristics. There was no bigger threat to the CCP's status as China's 'perennial ruling party' than a 'calcium deficiency of the spirit' among certain party members. It is therefore not surprising that commissars in CCP units, including the Propaganda Department, are pushing through draconian measures to prevent Chinese intellectuals, especially college students, from going down what Xi called 'the deviant path' of Westernization. In an unpublished internal party document entitled 'Concerning the Situation in the Ideological Sphere,' the CCP General Office called upon departments handling education, ideology and the media to tackle 'seven serious problems in the ideological sphere that merit attention'. The circular added that these problems reflected 'the sharpness and complexity of struggle in the ideological sphere'. What these challenges are is revealed by the fact that the document asked teaching staff in universities nationwide to steer clear of 'seven unmentionable topics' (*qige buyaojiang*): universal values; press freedom; the civil society; citizens' rights; the party's historical aberrations; the 'privileged capitalistic class' (*quanguo zichen jieji*); and independence of the judiciary."); see also Barbara Demick, *China's Xi More Maoist than Reformer Thus Far*, L.A. TIMES, June 8, 2013, <http://articles.latimes.com/2013/jun/08/world/la-fg-china-xi-20130608/2>; *Xi Jinping and His Take on the Seven Deadly Sins*, STIRRING TROUBLE INTERNATIONALLY (May 30, 2013, 12:03

Last year, Beijing's China University of Politics and Law installed cameras in classrooms. Officials said it was to prevent cheating, but professors didn't believe them. Liu Xin, who teaches administrative law, thinks the school plans to target teachers who might criticize China's current system in front of students. "Because things are recorded, once they suspect certain teachers are problematic . . . they can find the recordings and that means they've found evidence," Liu says. She says cameras will intimidate instructors from speaking their minds and undermine learning. Liu thinks professors will just teach from textbooks to protect themselves.²³

Citizens who feel that they have suffered privacy violations that were inflicted by other citizens can appeal to the Chinese legal system. However, there is little realistic probability of successful redress for privacy incursions inflicted by government entities. Only if a particular government official was found to have been acting illegally on a fairly significant scale would a citizen alleging privacy violations have an opportunity to air these grievances publicly, and the remedy would most likely be a public apology and possibly the censure of any official the Party concluded had acted corruptly.²⁴

The judicial system of the People's Republic of China (PRC) is described in Articles 123–35 of the Chinese Constitution.²⁵ From the top level of the power hierarchy down, the Chinese court system is comprised of the following: the Supreme People's Court, the Higher People's Courts, the Intermediate People's Courts, and the Basic People's Courts.²⁶

Litigants are generally limited to one appeal, on the theory of finality of judgment by two trials. Cases of second instances are often reviewed *de novo* as to both law and facts. Requests for appellate review take the form of appeals and protests (in criminal cases). Appeals are lodged by parties to the case, defendants and private prosecutors.²⁷

AM), <http://www.stirringtroubleinternationally.com/2013/05/30/xi-jinping-and-the-seven-unmentionables-or-deadly-sins-to-avoid/> ("Comrade Xi has told the Party faithful that there are seven unmentionables, seven 'deadly sins' that they should be very careful to avoid at all cost. The seven are: universal values; freedom of the press; civil society; human rights; the Party historical errors; the rich elite; and the independence of the judiciary. In case you are confused, these 'deadly sins' are all non-communist values. So what Comrade Xi is getting at really is that the greatest danger to communist rule is not a foreign intervention but the insidious penetration of foreign ideas and values.").

²³ Langfitt, *supra* note 20.

²⁴ This was learned by talking to attorneys in China.

²⁵ XIANFA arts. 123–35 (1982) (China); see also *A Brief Introduction to China*, LAWINFOCHINA.COM (May 31, 2010), <http://www.lawinfochina.com/Legal/index.shtm>.

²⁶ *A Brief Introduction to China*, *supra* note 25.

²⁷ *Id.*

Chinese courts function more as dispute resolution mechanisms than like Western style courts,²⁸ and usually do not issue substantively explanatory decisions, just rulings which state who wins, but not why.²⁹ It is hard to obtain dependable information about how much litigation concerning privacy issues has occurred in China. There isn't a comprehensive central repository of court decisions, and even when rendered the decisions are not public documents and usually are only released to the parties in the case.³⁰ When court decisions are lengthy, detailed and more widely released, it is usually in furtherance of a specific political agenda.³¹ So called "guiding cases" are intended to influence other judges' interpretations of particular laws, but they tend to be few and far between. In the active area of intellectual property law, which is comprised of patent law, trademark law, copyright law and sometimes trade secret law, usually only a proportionately small number of guiding cases are released each year,³² and if the prevailing views of the CPC change on an issue, the guiding cases can be withdrawn without notice or explanation. Even basic information like the number of decided cases by subject area, or by geographic region, is not readily available.³³

Economist Paul Krugman recently said of China:

All economic data are best viewed as a peculiarly boring genre of science fiction, but Chinese data are even more fictional than most. Add a secretive government, a controlled press, and the sheer size of the country, and it's harder to figure out what's really happening in China than it is in any other major economy.³⁴

Secrecy is also a hallmark of the Chinese judicial system. There is very little transparency in the operation of the courts, and little to no judicial

²⁸RACHEL E. STERN, ENVIRONMENTAL LITIGATION IN CHINA: A STUDY IN POLITICAL AMBIVALENCE 44 (2013).

²⁹See *id.* at 124.

³⁰*Id.* at 11.

³¹*Cf. id.* at 131.

³²See Supreme People's Court, *Annual Report on Intellectual Property Cases* (2012) (Abstract), CHINA L. & PRAC., Jul/Aug 2013, at 31; Supreme People's Court, *Annual Report on Intellectual Property Cases* (2011) (Abstract), CHINA L. & PRAC., June 2012, at 14; see also Judith Romero, *China Guiding Cases Project Publishes Four New "Guiding Cases" Released by China's Supreme People's Court*, SLS NEWS (May 3, 2012), <http://blogs.law.stanford.edu/newsfeed/2012/05/03/china-guiding-cases-project-publishes-four-new-%E2%80%9Cguiding-cases%E2%80%9D-released-by-chinas-supreme-peoples-court/>; Steven Tung, *As Chinese Courts Announce "Guiding Cases," Stanford Law School Helps To Spread the Word*, STAN. NEWS (Feb. 6, 2012), <http://news.stanford.edu/news/2012/february/china-guiding-cases-020612.html>; Laney Zhang, *China: Supreme People's Court Releases New Guiding Cases*, LIBR. CONGRESS, http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403371_text (last updated Oct. 17, 2012).

³³STERN, *supra* note 28, at 10–11.

³⁴Paul Krugman, *Hitting China's Wall*, N.Y. TIMES, July 19, 2013, <http://www.nytimes.com/2013/07/19/opinion/krugman-hitting-chinas-wall.html>.

independence. Verdicts are almost always issued without supporting written opinions that are publically available, if they exist at all. As one observer recounted:

It is important to note that, by design, China does not technically have an independent judiciary or a legal system that operates outside the influence of the ruling Chinese Communist Party. This is an important distinction between China and Western democracies in which the court system is a critical component of the checks and balances placed on the other branches of government. In fact, China's lack of an independent judicial system exacerbates all the other fault lines running through the totalitarian state: there simply is no effective recourse available to individuals whose interests are harmed by the excesses of CCP officials, laws, and institutions. Think of the scope and scale of what is addressed in the United States everyday through civil and criminal litigation—redress from unfair laws and business practices, compensation for injury, fraud, and lax environmental regulation, assignment of liability, justice for victims of public and private malfeasance, marital and custody disputes, protection of private physical and intellectual property. Some would argue ours is an overly litigious society. However, the average individual seeking a forum in which to officially air grievances and pursue some form of justice in China has a difficult time.

Most importantly, [China's legal] system lacks neutrality. The CCP approves all court appointments, and judges are technically responsible to the Party, not to the people. From the Basic, Intermediate, Higher Level People's Court, and Supreme People's Court, the CCP hand is evident. The CCP's Political and Legal Committee has the power to intervene in deliberations, and even to overturn verdicts issued. In addition, the infrastructure lacks capacity; for example, there is one lawyer per 10,000 people in China (the United States ratio is one lawyer per 550 people). And finally, in many Western democracies, the ultimate arbiter of a law's constitutionality is the court system. In China, this function becomes muddled and the CCP apparatus often rules on the interpretation of its own laws.³⁵

While some scholars argue that the Chinese legal system is developing in positive directions, others perceive what one describes as a turn against law that de-emphasizes the role of formal law and court adjudication in "a top-down authoritarian response motivated by social stability concerns."³⁶ Privacy provided by the Chinese legal infrastructure against the CPC is nonexistent. Like the United States, China lacks a comprehensive personal information law, but unlike in the United States there are no effective checks on governmental executive powers, or avenues of appeal to an independent judiciary,³⁷ or any

³⁵ *Modern China: The Promise and Challenge of an Emerging Superpower*, WORLD SAVVY MONITOR, June 2008, at 55, 55–56, available at http://worldsavvy.org/monitor/index.php?option=com_content&view=article&id=113&Itemid=176.

³⁶ Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935, 936 (2011).

³⁷ See generally DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL* 198–218 (2d ed. 2009).

ability to leverage investigative reporting in the national media. Given the perception of China as a place bereft of private communications options, the absence of a privacy legal regime is significant to foreign and domestic business interests.³⁸ The CPC understands this, and has been struggling to respond for years in a way that reassures those involved in commerce without emboldening those interested in political activism.

B. Consumers and Commercial Tracking

The Chinese Internet is by many accounts a giant shopping mall, much like what Westerners experience when they go online.³⁹ The Internet is used most by China's economic and educational elites;⁴⁰ there is a strong geographical correlation with Internet usage as well.⁴¹ As in any wealthy nation, business entities in China like to collect information about online consumers.⁴²

Privacy conflicts between private entities and private citizens are somewhat less problematic to the CPC than privacy issues between individuals and the CPC, at least in theory. The Chinese government has responded to concerns that emerging business practices related to advertising and marketing threaten the privacy of individuals⁴³ by issuing a startlingly large number of similar guidelines and regulations, and also proposing a few new laws.

A draft Personal Information Protection Law was published in late 2006, but never enacted.⁴⁴ Article 2 of the Tort Law of the People's Republic of China put into effect in 2012 references privacy generally, stating:

Those who infringe upon civil rights and interests shall be subject to the tort liability according to this Law. "Civil rights and interests" used in this Law

³⁸ Cf. *Freaking Out: Is Private Enterprise Under Attack?*, ECONOMIST (Sept. 14, 2013), <http://www.economist.com/news/china/21586293-private-enterprise-under-attack-freaking-out> (discussing China's recent crackdown on corruption in businesses, despite official statements that China will press for more business-friendly reforms).

³⁹ Gang Lu, *[Infographic] China's Internet Is a Giant Shopping Mall*, TECHNODE (Feb. 28, 2013), <http://technode.com/2013/02/28/infographic-chinas-internet-is-a-giant-shopping-mall/>.

⁴⁰ See David Wertime, *Translation: Why China Has Two Internets, Not One, and What To Do About It*, TEA LEAF NATION (Aug. 3, 2012), <http://www.tealeafnation.com/2012/08/translation-why-china-has-two-internets-not-one-and-what-to-do-about-it/>.

⁴¹ See Eli Bildner, *A Map of Two Chinas—Internet Penetration and Economic Development*, TEA LEAF NATION (Jan. 22, 2013), <http://www.tealeafnation.com/2013/01/a-map-of-two-chinas-internet-penetration-and-economic-development/>.

⁴² See Wang Yijun, *Who Steals My Personal Information?*, PEOPLE'S DAILY ONLINE (Mar. 30, 2012, 3:04 PM), <http://english.people.com.cn/90882/7774703.html>.

⁴³ See HAO WANG, PROTECTING PRIVACY IN CHINA: A RESEARCH ON CHINA'S PRIVACY STANDARDS AND THE POSSIBILITY OF ESTABLISHING THE RIGHT TO PRIVACY AND THE INFORMATION PRIVACY PROTECTION LEGISLATION IN MODERN CHINA 23–24 (2011).

⁴⁴ Gastón Fernández, *China Publishes Draft Privacy Guidelines*, HOGAN LOVELLS CHRON. DATA PROTECTION (Apr. 14, 2011), <http://www.hldataprotection.com/2011/04/articles/international-eu-privacy/china-publishes-draft-privacy-guidelines/>.

shall include the right to life, the right to health, the right to name, the right to reputation, the right to honor, right to self image, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, right to discovery, equities, right of succession, and other personal and property rights and interests.⁴⁵

In January of 2011, draft guidelines entitled “Information Security Technology—Guidelines for Personal Information Protection” were issued jointly by the General Administration of Quality Supervision Inspection and Quarantine, and the Standardization Administration, after being developed in consultation with the Ministry of Industry and Information Technology, the PRC agency that regulates telecommunications.⁴⁶ An amended version of the Guidelines was put into effect in 2013.⁴⁷ The Guidelines only apply to computer networks.⁴⁸ The Guidelines require that personal information be processed only for specific and reasonable purposes and that owners be notified of the purpose and scope of use before their personal information is processed.⁴⁹ Entities are required to ensure that the personal information collected is accurate and is adequately protected to prevent unauthorized access, release, destruction or alteration.⁵⁰ The Guidelines prohibit illegal, disguised or indirect collection of personal information.⁵¹

The Guidelines further prohibit collecting personal information from juveniles below the age of sixteen⁵² or collecting any personal information irrelevant to the defined purposes, especially with respect to race, religion, genetic background, fingerprints, health status or sexual activities.⁵³ Owners have the right to request that managers keep their personal information confidential, and to disclose how the information was obtained, processed or disclosed. Owners also have the right to demand that any false information be corrected.⁵⁴

⁴⁵ *Tort Law of the People's Republic of China*, PROCEDURALLAW.CN (Jan. 10, 2010), http://www.procedurallaw.cn/english/law/201001/t20100110_300173.html (last visited Oct. 21, 2013) (providing an English translation).

⁴⁶ Graham Greenleaf & George Yijun Tian, *China Expands Data Protection Through 2013 Guidelines: A “Third Line” for Personal Information Protection, with a Translation of the Guidelines*, 122 PRIVACY L. & BUS. INT’L REP. 1, 1, 4 (2013).

⁴⁷ *Id.* at 2.

⁴⁸ *Id.* at 7.

⁴⁹ *Id.* at 14.

⁵⁰ *Id.* at 5.

⁵¹ *Id.* at 4–5.

⁵² Greenleaf & Tian, *supra* note 46, at 16.

⁵³ *See id.* at 9.

⁵⁴ *See id.* at 3–5. *See generally* Hunton & Williams LLP, *China: Draft of Personal Information Protection Guidelines Issued for Comment*, PRIVACY & INFO. SECURITY L. BLOG (Feb. 2011), http://www.huntonprivacyblog.com/uploads/file/china_draft_of_personal_info_protection_guidelines_issued_for_comment.pdf.

On December 28, 2012, the Standing Committee of the National People's Congress passed the *Resolution of the Standing Committee of the NPC Relating to Strengthening the Protection of Information on the Internet*.⁵⁵ These Regulations proclaim that "the State will protect electronic information that can identify individuals and implicate their private affairs, and [that] no organization or individual may misappropriate or otherwise obtain electronic personal information by unlawful means, or sell or otherwise unlawfully provide it to other persons."⁵⁶ The Regulations set forth requirements directed at Internet Service Providers (ISPs) and other businesses that handle electronic personal information:⁵⁷

ISPs, public service units (PSUs) and other companies that intend to collect and use personal digital information:

- Must make their policies for collection and use public
- Must explicitly state the purposes, means, and scope of the collection
- Must obtain the consent of the all [sic] of the subjects of the data collection
- Must not violate relevant laws and regulations
- Must not violate any agreements or contracts with the subjects of the data collection.⁵⁸

The scope of the Regulations is limited to electronic personal information and, for the most part, only Internet-related processing.⁵⁹ Still, it seems to suggest CPC recognition that people care about online privacy and want the government to regulate how private entities interact with them and their personal data. How these Regulations will be enforced is an open question, but their passage signals that the CPC believes the issue is important to the Chinese citizenry, and something that the Chinese people expect their government to concern itself with.

In April 2013, the People's Republic of China's General Office of the National People's Congress published a draft amendment to the Law on the Protection of Consumer Rights and Interests (enacted in 1994) and solicited public comments on the amendment.⁶⁰ The existing Law on the Protection of

⁵⁵ Hunton & Williams LLP, *Chinese Legislature Passes Data Privacy Resolution*, PRIVACY & INFO. SECURITY L. BLOG (Jan. 2, 2013) [hereinafter *Data Privacy Resolution*], <http://www.huntonprivacyblog.com/2013/01/articles/chinese-legislature-passes-data-privacy-resolution/>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Samon Sun & Jared Nelson, *China: Decision on Strengthening the Protection of Online Information*, NAT'L L. REV. (Jan. 7, 2013), <http://www.natlawreview.com/article/china-decision-strengthening-protection-online-information>.

⁵⁹ *Data Privacy Resolution*, *supra* note 55.

⁶⁰ See *Amendments Viewed for Consumer Rights*, SHANGHAI DAILY, Apr. 24, 2013, <http://www.shanghaidaily.com/national/Amendments-viewed-for-consumer-rights/shdaily.shtml>.

Consumer Rights and Interests, which has been in effect for about twenty years, does not contain provisions that protect the personal information of consumers.⁶¹ The proposed amendment would address this omission, affirming that consumers are entitled to the rights of name, image and privacy, and that business owners should obtain consumers' consent and explicitly explain the purpose, form and scope of information use before collecting and using consumers' personal information, and imposing an obligation on business owners to adopt necessary technical measures to ensure security.⁶² The proposed amendment extends existing rules applicable to the Internet information services sector to the broader realm of consumer protection, and mirrors provisions which have been in effect at the provincial level under provincial consumer protection regulations.⁶³

Thus, there has been a significant legislative response to concerns about online privacy. But it is not clear that anything truly meaningful transpired. One scholar of the Chinese legal system recently observed:

Frankly speaking, in the past decades, there are more and more new laws, new ordinances, new judicial interpretations, which, many of Chinese citizens think, are really no need to make such rules, and too often these rules confused, not only us—the common citizens, but also confused lots of judges, that is not a good scenario.⁶⁴

What is not known about these overlapping privacy guidelines, regulations and laws is how often they are invoked, and whether they are ever effectively enforced. In 2007 it was widely reported that a Chinese college student in Beijing sued Microsoft for violating his privacy with antipiracy software.⁶⁵ I was not able to learn the outcome of this case, however, or find others like it in English language media generally or via the English language version of China Law Digest, which reports only a total of two cases involving privacy issues, one a right of privacy for Hepatitis B carriers and the other basically a notice that the “Ministry Of Civil Affairs Emphasizes Respect for Personal Privacy in Marriage.”

III. PRIVACY AND POLITICAL AMBIVALENCE

In her brilliant book *Environmental Litigation in China*, Rachel E. Stern writes about the political ambivalence endemic to China in the context of

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See id.*

⁶⁴ Liubao Wu, *Rebuilding Public Trust and Confidence in Chinese Courts* 5 (Jan. 10, 2013) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2283189&download=.

⁶⁵ Gregg Keizer, *Chinese Student Sues Microsoft for Privacy Violation*, PCWORLD (Sept. 18, 2007, 12:00 PM), <http://www.pcworld.com/article/137315/article.html>.

environmental law and litigation.⁶⁶ She notes that there are many different bureaucracies at the provincial and national levels, and they can send conflicting signals about important policy issues.⁶⁷ Additionally, CPC representatives vet judicial appointments and sometimes intervene in individual court decisions in ways that do not always appear consistent. All of these factors work against the formation of a coherent approach to environmental law in China.⁶⁸

The same sort of ambivalence seems to infuse the CPC approach to privacy and the law. Governmental officials charged with economic development are likely to have a very different view of the desirability of a privacy infrastructure than those involved with maintaining social stability. This sort of fragmented, internal-conflict-driven approach to privacy is not unique to the Chinese government of course. But China's political and legal systems can render the specific dimensions of the issue uncommonly invisible. There may not be any public record whatsoever of efforts taken by citizens to enforce their statutory privacy rights. As one reporter noted, "China's legal system often hands down verdicts that the powerless consider unfair. But a bigger problem is that courts often refuse to issue any verdict at all—or even acknowledge that some bothersome legal complaints exist."⁶⁹ In this way the answer to thorny questions about politically difficult privacy issues is neither yes nor no.⁷⁰

A. Little Anonymity for Anyone Online or Off

China is divided into twenty-two provinces⁷¹ (twenty-three if one includes Taiwan, as the CPC prefers to do), four independent municipalities (Beijing,

⁶⁶ See generally STERN, *supra* note 28.

⁶⁷ See *id.* at 99.

⁶⁸ *Id.* at 6–8; Nicholas Calcina Howson, "Quack Corporate Governance" as Traditional Chinese Medicine—the Securities Regulation Cannibalization of China's Corporate Law and a State Regulator's Battle Against State Political Economic Power, SEATTLE U. L. REV. (forthcoming) (Mich. Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 331, 2013) (Law & Econ. Research Paper Series, Paper No. 13-009, 2013) (manuscript at 3), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2279264&download=yes ("Fifth and finally, I believe that this writing reveals a highly complex, and horizontally-oriented, identity of what political scientists have called the PRC party state's 'fragmented authoritarianism'—or how vertically arranged silo-systems of power in what is understood as a unitary party state are permitted to compete and constrain horizontally-situated, short-term focused, political economic power in the service of long-term economic system and development policy goals.").

⁶⁹ Joseph Kahn, *When Chinese Sue the State, Cases Are Often Smothered*, N.Y. TIMES, Dec. 28, 2005, <http://www.nytimes.com/2005/12/28/international/asia/28land.html?ex=1172466000&en=1c4306de9a1f7a30&ei=5070>.

⁷⁰ See *id.*

⁷¹ Amanda Briney, *China's 23 Provinces: A List of China's 23 Provincial Divisions*, ABOUT.COM, <http://geography.about.com/od/chinamaps/a/chinaprovinces.htm> (last updated June 14, 2010) (stating the area and capital of each province as follows: 1) Qinghai. Area: 278,457 square miles (721,200 sq. km.); Capital: Xining. 2) Sichuan. Area: 187,260 square

Shanghai, Tianjin and Chongqing), five autonomous regions (Inner Mongolia, Xinjiang, Guangxi, Ningxia and Tibet), and two special administrative regions (Hong Kong and Macau). Each of these political subdivisions has a central government, and a court system. Chinese citizens are issued identity cards, which they are required—or at least well advised—to keep with them at all times.⁷² The identity cards contain the name, sex, nationality, date of birth, address of permanent residence of the bearer, the citizen's identity number, the bearer's photograph, term of validity of the card and the issuing authority, and serve the "purposes of proving the identities of the citizens residing within the territory of the People's Republic of China, safeguarding their legitimate rights and interests, facilitating their social activities and maintaining public order."⁷³

Under the Hukou system, Chinese citizens are expected—and sometimes required—to remain in the province or other subdivision in which they were born.⁷⁴ They need permission to live and work elsewhere in China, and may be denied social benefits even if they relocate legally.⁷⁵ National identity cards are

miles (485,000 sq. km.); Capital: Chengdu. 3) Gansu. Area: 175,406 square miles (454,300 sq. km.); Capital: Lanzhou. 4) Heilongjiang. Area: 175,290 square miles (454,000 sq. km.); Capital: Harbin. 5) Yunnan. Area: 154,124 square miles (394,000 sq. km.); Capital: Kunming. 6) Hunan. Area: 81,081 square miles (210,000 sq. km.); Capital: Changsha. 7) Shaanxi. Area: 79,382 square miles (205,600 sq. km.); Capital: Xi'an. 8) Hebei. Area: 72,471 square miles (187,700 sq. km.); Capital: Shijiazhuang. 9) Jilin. Area: 72,355 square miles (187,400 sq. km.); Capital: Changchun. 10) Hubei. Area: 71,776 square miles (185,900 sq. km.); Capital: Wuhan. 11) Guangdong. Area: 69,498 square miles (180,000 sq. km.); Capital: Guangzhou. 12) Guizhou. Area: 67,953 square miles (176,000 sq. km.); Capital: Guiyang. 13) Jiangxi. Area: 64,479 square miles (167,000 sq. km.); Capital: Nanchang. 14) Henan. Area: 64,479 square miles (167,000 sq. km.); Capital: Zhengzhou. 15) Shanxi. Area: 60,347 square miles (156,300 sq. km.); Capital: Taiyuan. 16) Shandong. Area: 59,382 square miles (153,800 sq. km.); Capital: Jinan. 17) Liaoning. Area: 56,332 square miles (145,900 sq. km.); Capital: Shenyang. 18) Anhui. Area: 53,938 square miles (139,700 sq. km.); Capital: Hefei. 19) Fujian. Area: 46,834 square miles (121,300 sq. km.); Capital: Fuzhou. 20) Jiangsu. Area: 39,614 square miles (102,600 sq. km.); Capital: Nanjing. 21) Zhejiang. Area: 39,382 square miles (102,000 sq. km.); Capital: Nanjing. 22) Taiwan. Area: 13,738 square miles (35,581 sq. km.); Capital: Taipei. 23) Hainan. Area: 13,127 square miles (34,000 sq. km.); Capital: Haikou); Sara Naumann, *List of China's Provinces: Understand the Chinese Provinces*, ABOUT.COM, http://gochina.about.com/od/cityareaguides/inchina/tp/Chinese_Provinces.htm (last visited Oct. 2, 2013). By some accounts, China counts Taiwan as its 23rd province. See, e.g., *The World Factbook: China*, *supra* note 13.

⁷² See Law of the People's Republic of China on Resident Identity Cards (promulgated by the Standing Comm. Nat'l People's Cong., June 28, 2003, effective Jan. 1, 2004) (China), available at http://english.gov.cn/laws/2005-09/06/content_29700.htm.

⁷³ *Id.*

⁷⁴ See Aaron Back, *China To Speed Up Reform of "Hukou" System*, WALL ST. J., Dec. 18, 2012, <http://online.wsj.com/article/SB10001424127887324407504578186704284896948.html>; see also Kam Wing Chan & Will Buckingham, *Is China Abolishing the Hukou System?*, 2008 CHINA Q. 582, 582–84.

⁷⁵ See Chan & Buckingham, *supra* note 74, at 583; Back, *supra* note 74; Evan Osnos, *Abortion and Politics in China*, NEW YORKER (June 15, 2012), <http://www.newyorker.com/online/blogs/evanosnos/2012/06/abortion-and-politics-in-china.html> ("What's more, the

one mechanism used by Chinese governmental entities to keep track of where people are residing, and with whom they are sharing a home. They are also used to track citizens' domestic travels. An identity card must be proffered to purchase a plane or train ticket, or to check into a hotel.

Chinese citizens are also monitored and tracked online. While this is true for most and possibly all citizens of every country, the monitoring is more transparent in the sense that everyone knows it is happening very extensively. In China all non-commercial websites, including blogs, must be registered, and the sites' developers or owners must provide their identities.⁷⁶ Similar identity registration regulations apply to individuals who engage in microblogging, using platforms such as Weibo, a Chinese equivalent of Twitter, and QQ, a Facebook-like social media platform.⁷⁷ This does not seem to dampen enthusiasm for the Internet in China, which may be the largest and fastest-growing market for blog and other social media services in the world:

According to an official report released by the China Internet Network Information Center, as of the end of June 2012, the number of blogs in China had reached more than 353 million and about 65.7% of Chinese Internet users had their own blogs. In recent years, a vast number of Chinese Internet users have also shown strong interest in maintaining their own microblog, or *weibo*, which is the Chinese version of Twitter. More than 273 million microblogs have been launched in China, which means that about 50.9% of China's Internet users have been involved in microblogging activities.⁷⁸

One of the reasons interest in blogging and microblogging has not been discouraged by the instantiation of the real-name policy is the possibility that the policy isn't actually enforced very broadly.⁷⁹ The enforcement burden is a heavy yoke on telecommunications companies that has complicated internecine connections with the CPC. The CPC may be allowing a long phase in, or it may be too divided to act decisively to compel compliance.

family was being penalized because of the widely resented 'household registration' system, which acts [as] a kind of domestic passport to limit migration. Feng and her husband reportedly thought they were entitled to a second child because many of their friends were (some rural areas are less strict), but it turned out that Feng's registration, or *hukou*, was still tied to her former address in another province, so she didn't get the same exemptions to the one-child policy. The house-registration system has been widely criticized for creating something like an apartheid structure, which prevents people from gaining equal access to schools, social services, and jobs.").

⁷⁶ Jyh-An Lee, *Regulating Blogging and Microblogging in China*, 91 OR. L. REV. 609, 612 (2012).

⁷⁷ See generally Rachel Lu, *What Happens to Free Speech on Weibo After Real Name Registration?*, TEA LEAF NATION (Feb. 28, 2012), <http://www.tealeafnation.com/2012/02/what-happens-to-free-speech-on-weibo-after-real-name-registration/>.

⁷⁸ Lee, *supra* note 76, at 609–10 (footnotes omitted).

⁷⁹ See David Caragliano, *Why China's "Real Name" Internet Policy Doesn't Work*, ATLANTIC (Mar. 26, 2013, 10:57 AM), <http://www.theatlantic.com/china/archive/13/03/why-chinas-real-name-internet-policy-doesnt-work/274373/>.

The most salient feature of the CPC's relationship with the wired world is that Chinese leaders do not consider the Internet an unstoppable force for openness and democracy; rather, they view the Web as something that is fundamentally controllable if adequate attention and resources are deployed toward this end. When seemingly omnipresent governmental monitoring discerns objectionable communications, communications can be deleted expeditiously, and the posters held legally responsible.

In addition, the Internet service and content providers that permit unacceptable-to-authority communications to be distributed online can also be held accountable. This means that media companies must stay closely in communication with the CPC. As one observer wrote of a high profile unnamed Chinese telecom executive: "In the past, W naively believed that he could use technology to change society. Now he knows that even if you don't involve yourself in politics, politics will find a way to get involved with you."⁸⁰ Chinese telecommunications companies engage in significant acts of censorship of their networks before the governmental authorities take their turns, to curry favor and to try to avoid trouble.⁸¹

Mechanisms of electronic communications control are deployed by the CPC for two distinct but related categories of reasons: preventing anything that might cause social unrest, especially community organizing, and preserving the personal and professional reputations of CPC leaders. As one journalist observed, China's criteria for censoring the Internet involve applying to the online environment "the rules that have prevailed since the Tiananmen Square crackdown of 1989: do not jeopardise social stability, do not organise and do not threaten the party."⁸²

B. *Communitarian Concerns*

China is a large and diverse country with a long history of armed insurrections and a comparatively short history of national unity and relative social and economic stability. Retaining a healthy level of social constancy is doubtlessly a complicated and difficult endeavor, and I don't in any way purport to have a good sense of how much democracy is politically possible for China in the short term. But even peaceful public dialogue is treated as a threat to the government when the number of people engaging in the same conversation reaches a number high enough to make the CPC uneasy. This is one explanation for the persecution of Falun Gong adherents by the CPC, even though Falun Gong teachings have never advocated violence or revolution. Falun Gong got

⁸⁰ Wertime, *supra* note 40.

⁸¹ See E.H., *How Does China Censor the Internet?*, *ECONOMIST* (Apr. 21, 2013, 11:50 PM), http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-how-china-censors-internet?fsrc=scn%2Ftw_ec%2Fhow_does_china_censor_the_internet.

⁸² *Id.*

organized, and there were simply too many people joining up and members were too enthusiastic for CPC comfort.⁸³

The Chinese government, at every level, has emphatically embraced the power of the Internet in some respects, and uses blogs and other web sites as tools to shape public opinion.⁸⁴ It has long experience in media manipulation. Whenever I watch the English language broadcast of CCTV News when I am in the country, it seems as though only wonderful things are happening in China, but consistently horrible events are occurring abroad: political upheavals, natural disasters, and numerous crimes. The only positive thing I ever recall seeing broadcast on CCTV about the United States was the time President Obama was videoed catching and killing a fly during an interview in 2009. For some reason that event got significant television coverage in China, and many Chinese people I spoke to in the summer of 2013 still remembered it.

The CPC presence online is engaged with surreptitiously manipulative tools such as astroturfing and search engine optimization.⁸⁵ According to one scholar, "It is reported that an army of government-trained online commentators writes blogs in support of the Chinese state and its various stances."⁸⁶ Notable China scholar Rebecca MacKinnon has reported:

The [Chinese] government increasingly combines censorship and surveillance measures with pro-active efforts to steer online conversations in the direction it prefers. In 2008 the Hong Kong-based researcher David Bandurski determined that at least 280,000 people had been hired at various levels of government to work as "online commentators." Known derisively as the "fifty cent party," these people are paid to write postings that show their employers in a favorable light in online chat rooms, social networking services, blogs, and comments sections of news websites. Many more people do similar work as volunteers—recruited from among the ranks of retired officials as well as college students in the Communist Youth League who aspire to become Party members.⁸⁷

That being said, the CPC will often circulate reports about government failures and even government corruption—just not all of them, and generally from a very circumspect and verifiable fact-deficient perspective. To me it

⁸³ See generally LAO CHENG-WU, *THE REFUTATION AND ANALYSIS OF FALUN GONG* (2012).

⁸⁴ See Jesper Schlaeger & Min Jiang, *Battering Ram, Virus, or Politics as Usual? A Case Study of Chinese Local Government Microblogging 5* (July 1, 2013) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2258565.

⁸⁵ See Nate Anderson, *280,000 Pro-China Astroturfers Are Running Amok Online*, ARS TECHNICA (Mar. 26, 2010, 11:10 AM), <http://arstechnica.com/tech-policy/2010/03/280000-pro-china-astroturfers-are-running-amok-online/>.

⁸⁶ Lee, *supra* note 76, at 612.

⁸⁷ Rebecca MacKinnon, Visiting Fellow, Ctr. for Info. Tech. Policy, Princeton Univ., Testimony Before the Congressional-Executive Commission on China 8 (Mar. 1, 2010) (footnote omitted).

looks very much like some people within the CPC want to do the right thing by Chinese citizens some of the time, but are restrained by a fear of undermining Party authority or angering the wrong person.

Collective criticisms are of less concern to the government than one might expect; it is unauthorized collective organizing that is most feared. References to Taiwan, Tibet and the spring 1989 incident known as the Tiananmen Square Massacre are by some accounts censored primarily to reduce the risk that they will be used as foundational organizing tools for protests and rebellion. I was surprised by how open some Chinese people were to discussing these matters with me. Many had family members in Taiwan they talked about, or expressed a desire to visit Tibet. Because the so-called Tiananmen Uprising was actually dispersed geographically, and included protests in large cities such as Shanghai, Chengdu and Guangzhou,⁸⁸ people well outside of Beijing had participated in, observed, or otherwise been affected by that event and were open to talking about it in limited ways. With a few exceptions, the only time the topic came up in my presence was when somebody else raised it. But once it was raised, I asked questions and heard a number of opinions in response. A couple of people even showed me photographs of students petitioning their government during the optimistic first few days of the democracy protests. What I heard in China from Chinese people was consistent with what I'd read⁸⁹ and also heard from Chinese immigrants who relocated to the United States in 1989 after participating in the movement, to avoid being jailed for their activities. As China expert Jeffrey Wasserstrom noted:

Other writers misleading[ly] present the taboo regarding discussion of the June 4th Massacre in a manner that suggests a Big Brother state is tightly monitoring even the most private conversations, when the reality is that many people in China now feel free (and indeed are free), as they weren't always before, to talk among themselves about even hot-button topics, such as the crackdown in 1989, that would likely get them into trouble if they published about them or held meetings to discuss them.⁹⁰

That the CPC tolerates generalized criticism is illustrated by its relationship to Mo Yan, the Chinese author who received the 2012 Nobel Prize for

⁸⁸ Claudia Rosett, *Remembering Tiananmen Square*, FORBES (May 28, 2009, 12:00 AM), <http://www.forbes.com/2009/05/27/tiananmen-square-anniversary-mao-opinions-columnists-china.html> ("the movement . . . brought millions into the streets, not only in Beijing, but in other major cities like Shanghai, Chengdu, Guangzhou").

⁸⁹ E.g., JEFFREY N. WASSERSTROM, *CHINA IN THE 21ST CENTURY: WHAT EVERYONE NEEDS TO KNOW* 72–75 (2010).

⁹⁰ Jeffrey Wasserstrom, *Illuminating and Misleading Takes on China 20 Years Since Tiananmen*, HUFFINGTON POST (June 4, 2009), http://www.huffingtonpost.com/jeffrey-wasserstrom/illuminating-and-misleading_t_211610.html; cf. Christopher Beam, *What Does the Chinese Government Say Happened at Tiananmen Square?*, SLATE MAG. (June 3, 2009, 7:10 PM), http://www.slate.com/articles/news_and_politics/explainer/2009/06/tussle_in_tiananmen_square.html.

Literature.⁹¹ “Bull,” a short story by Mr. Yan that was translated into English and published in the November 26, 2012 issue of the *New Yorker*, features corruption and the distribution of unhealthy foods right from the opening paragraph, which reads as follows:

It was Lao Lan who invented the scientific method of forcing pressurized water into the pulmonary arteries of slaughtered animals. With this method, you could empty a bucketful of water into a two-hundred-jin pig, while with the old method you could barely empty half a bucket of water into the carcass of a dead cow. The amount of money that the clever townspeople have spent on water from our village when they thought they were paying for meat in the years since will never be known, but I’m sure it would be a shockingly high figure.⁹²

The Lao Lan character is later described as a rich official who injected formaldehyde into the meat he sold so that it would not spoil, a bully, and a coward. Novels written by Mr. Mo “have touched on many of contemporary China’s most sensitive themes, including the Cultural Revolution and the country’s strict family-planning policies,” and “have been judged subversive because of their sharp criticism of contemporary Chinese society.”⁹³ And his books were published with the authority and permission of the CPC. Mo Yan is not just tolerated by the Chinese government, but actually employed by it. He serves as vice chairman of the State-run Chinese Writers’ Association.⁹⁴

Additionally, the CPC indirectly polices and criticizes itself. Newspapers are owned and controlled by the Party, and the government employs the journalists who fill their pages. In consequence, some topics are never covered and others are addressed in skewed or blatantly dishonest ways. Nevertheless, some of China’s social problems are identified and discussed, and governmental actions are criticized in official publications. My journalist and journalism professor friend and fellow 2011–2012 China Fulbrighter, Jill Hamburg Coplan,⁹⁵ has passionately explained that many journalists in China want to do the right thing and keep pushing for a freer press. Incidents that are too big to

⁹¹ Andrew Jacobs & Sarah Lyall, *After Fury over 2010 Peace Prize, China Embraces Nobel Selection*, N.Y. TIMES, Oct. 11, 2012, <http://www.nytimes.com/2012/10/12/books/nobel-literature-prize.html?pagewanted=all>.

⁹² Mo Yan, *Bull*, NEW YORKER, Nov. 26, 2012, http://www.newyorker.com/fiction/features/2012/11/26/121126fi_fiction_mo#ixzz2DMIW0SI.

⁹³ Jacobs & Lyall, *supra* note 91.

⁹⁴ *Id.* (“Mr. Mo, 57, is hardly a tool of the Communist Party; much of his work is laced with social criticism, and he is admired by readers of Chinese literature abroad as much as he is hugely popular in his own country. But he does not consider himself political, and his decision not to take a stand against the government—as well as his position as vice chairman of the state-run Chinese Writers’ Association—has drawn criticism from Chinese dissident writers.”).

⁹⁵ See generally Jill Hamburg Coplan, COPLANS IN CHINA: A FULBRIGHT YEAR IN BEIJING, AND BEYOND, <http://coplansinchina.com/> (last updated Sept. 29, 2013).

hide are now covered with surprising thoroughness. This was not readily observable as recently as 2008 in the aftermath of the massive Sichuan earthquake, when the *New York Times* accused the Chinese government of a campaign to silence the surviving victims and the media, resorting to harassment by police and threats of imprisonment.⁹⁶ But now social media platforms, though ostensibly under CPC control, are forcing the CPC to communicate more actively and perhaps more openly.

When a high speed rail crash that killed forty people and injured 172 occurred in 2011, the power of Weibo (a Chinese homologue to Twitter) was unequivocally displayed, as thirty million messages about the collision were posted too quickly to be effectively censored.⁹⁷ Mainstream CPC censors who controlled Chinese news outlets may have felt pressured by this online outpouring to offer more extensive coverage of the tragic event than they otherwise might have. The magnitude of the online public dialogue also may have motivated the government to act more dramatically than it would have with less public interest or scrutiny. The CPC-administered Chinese media has reported that CPC authorities are punishing fifty-four people deemed responsible for the technical problems that led to the collision, and actually named at least three of them publicly: Liu Zhijun, the country's former railway minister, Zhang Shuguang, the railway ministry's former deputy chief engineer, and Ma Cheng, former chairman of board at China Railway Signal and Communication Corporation (CRSC), producer of the railway signaling system which failed.⁹⁸ Liu Zhijun was charged with bribery and abuse of power, which are potentially death penalty offenses in China.⁹⁹

The authorized press sometimes also covers fairly extreme failings by the Chinese criminal justice system. For example, in 2005 the CPC-managed China Daily News reported that: "A Chinese woman believed to have been killed in the 1980s reappeared 16 years after the alleged killer was executed."¹⁰⁰ The article raises a stunning number of issues in very few words, including human trafficking, the incorrect identification of a corpse, potential perjury, fear of the

⁹⁶ See *Sichuan Earthquake*, N.Y. TIMES, May 6, 2009, http://topics.nytimes.com/top/news/science/topics/earthquakes/Sichuan_province_china/index.html.

⁹⁷ C. Custer, *The Wenzhou Crash and the Future of Weibo*, TECH ASIA (Aug. 1, 2011, 5:00 PM), <http://www.techinasia.com/the-wenzhou-crash-and-the-future-of-weibo/>; Kenneth Rapoza, *In China Train Crash, Sina's Weibo Breaks News*, FORBES (Aug. 1, 2011), <http://www.forbes.com/sites/kenrapoza/2011/08/01/in-china-train-crash-sinas-weibo-breaks-news/>; see also Zhan Zhang, *Rock the Journalism—the Function of Weibo in Foreign Media's News Practice in China* (Apr. 29, 2013) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2258101&download=yes.

⁹⁸ *54 Punished over Train Crash*, CHINA DAILY, Dec. 28, 2011, http://europe.china-daily.com.cn/china/2011-12/28/content_14346197.htm.

⁹⁹ Cao Yin & An Baijie, *Former Railways Minister Charged with Bribery*, CHINA DAILY, Apr. 11, 2013, http://europe.chinadaily.com.cn/china/2013-04/11/content_16391594.htm.

¹⁰⁰ "Victim" Reappears After "Murderer" Executed, CHINA DAILY, June 17, 2005, http://www.chinadaily.com.cn/english/doc/2005-06/17/content_452336.htm.

legal system, and the possibility that torture had been used to obtain a coerced confession, stating in pertinent part:

Shi Xiaorong was declared a "murder victim" by local police in April 1987 in Mayang county in Central China's Hunan Province after a dismembered body was found in a Mayang river.

Shi said she was actually swindled and sold to Shandong Province as somebody's wife in March that year.

Teng Xingshan, a butcher, was convicted of the murder as the local police said the dismemberment technique was "very professional." He was executed in 1989 despite pleas of innocence.

According to police investigation material, Teng was believed to have sexual relations with Shi and killed her on suspicions of her stealing his money.

But Shi, who is now in a Guizhou jail for drug trafficking, said she did not know Teng, urging the authorities to rectify the case.

Shi returned to her hometown in Guizhou Province in 1993 and Teng's relatives [were] told she was still alive one year later. But it took years for them to verify the information and they did not have the funds and the courage to take the case to court until Teng's daughter and son lodged a lawsuit at the Hunan Higher People's court last month.

The 1989 verdict of the court reads that: "Teng confessed his crimes and his confession conformed with scientific inspections and identifications." Whether torture was used in trial is still unknown.¹⁰¹

As if all that wasn't shocking enough, the article concludes by noting another wrongful murder conviction that had been recently reported, which also included allegations of a confession obtained by torture:

The case came two months after the She Xianglin case in Hubei Province. She Xianglin served 11 years in prison for "murdering" his wife in 1994 who reappeared in 2005.

She was later declared innocent and released from the prison.

Former security guard She claimed he was deprived of sleep during 10 days of interrogation until he signed documents pleading guilty to murder. He is now suing the government for compensation over his mistrial and torture during interrogation.¹⁰²

There are, however, many important details missing in these accounts, such as the names of anyone working for the government who was involved in the arrest, conviction and execution of Teng Xingshan or the arrest, conviction and imprisonment of She Xianglin. The names of the police officers are not provided, nor the names of the judges involved, nor even the names of any witnesses. Some people involved have clearly had their personal privacy

¹⁰¹ *Id.*

¹⁰² *Id.*; see also "Murder Victim" Reappears After "Killer" Executed, CHINA.ORG.CN (June 17, 2005), <http://www.china.org.cn/english/2005/Jun/132377.htm>.

respected at the expense of a full account of reported events. Both cases appear to have been reported as the public-opinion-shaping part of an initiative to give the Supreme People's Court jurisdiction over all appeals in death penalty cases.¹⁰³ The death penalty itself continues to be favored by Chinese citizens,¹⁰⁴ despite the Teng case and others in which innocent people may well have been executed¹⁰⁵ and perhaps in small part because of a sense that legal reforms have

¹⁰³ See Calum MacLeod, *China Plans To Use Death Penalty More Sparingly*, USA TODAY, May 16, 2006, http://usatoday30.usatoday.com/news/world/2006-05-15-china-death_x.htm; COMM. AGAINST TORTURE, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION 3 (2008), *available at* <http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.CHN.CO.4.pdf>.

¹⁰⁴ Zi Heng Lim, *Why China Executes So Many People*, ATLANTIC (May 9, 2013, 9:30 AM), <http://www.theatlantic.com/china/archive/2013/05/why-china-executes-so-many-people/275695/>.

¹⁰⁵ *China Murderer Awaits Trial After Innocent Man Executed: Report*, SINO DAILY (Aug. 5, 2009), http://www.sinodaily.com/reports/China_murderer_awaits_trial_after_innocent_man_executed_report_999.html ("Hugejiletu was put to death in June 1996 for the rape and murder of a woman in the toilet of a textile factory in Hohhot, capital of the northern region of Inner Mongolia, the Beijing News reported. Hugejiletu, who had reported the case to police, had maintained he was innocent despite attempts to get him to confess. In October 2005, a man named Zhao Zhihong was arrested by police and confessed to killing 10 people in Inner Mongolia, including the woman murdered in the factory, the state-run newspaper said."); Jiabao Du, *Failing Trust in China's Courts: Is Wang Shujin the Last Straw?*, TEA LEAF NATION (July 8, 2013), <http://www.tealeafnation.com/2013/07/failing-public-trust-in-chinas-courts/> ("In 2005, Wang Shujin was arrested and confessed to four cases of murder and rape, including that of Nie Shubin's case, stunning the entire country and the Nie family. However, this twist of fate has not, as of yet, affected Nie Shubin's case. In an interview with the *Oriental Morning Post* on June 25, Zhang Huanzhi said she has gone to the High Court of Hebei Province every month for the past eight years to appeal to overturn her son's sentence and she has always been told to 'wait for notice at home.' The public and legal scholars suspect that Nie Shubin was wronged because the courts have been delaying their response. Nie Shubin was convicted based solely on his confession – which many believe was forced. Aside from his oral confession, prosecutors did not prove his guilt with witnesses or physical evidence such as fingerprints, blood, or semen. In recent years, many staggering injustices similar to Nie's case have come to light. In part due to assuming suspects are guilty and requiring that their innocence be proven, instead of the other way around, Chinese courts have maintained a very high conviction rate—99.9% in 2009, according to official statistics—so it is no surprise that some of those who stand trial are wrongly convicted. In March 2013, Zhang Hui and Zhang Gaoping were released from jail after serving 10 years for being convicted of raping and killing a girl whom they gave a free ride. In 2011, a famous lawyer named Zhu Mingyong and a respected prosecutor named Zhang Biao succeeded in soliciting the High Court in Hangzhou City in Zhejiang Province to reinvestigate and retry the case. It was found that the DNA left in the victim's nails matched the DNA of a criminal who was convicted of rape and murder and executed in 2005. The Zhangs said they were tortured for multiple consecutive days and nights to confess. In May 2010, Zhao Zuohai was released from jail after serving 11 years because the victim named Zhao Zhenshang whom he was convicted of murdering in 1999 returned. It was found that the victim's body had been misidentified by the family as Zhao Zhenshang. In May 2005, after serving 11 years, She Xianglin was acquitted because his wife, whom he was charged with murdering in 1995, went back home for a visit. She had moved to another

been made that might prevent innocent people from being executed in the future.

The CPC has also allowed a wrenching widespread societal debate within China about how Chinese people should treat each other, in terms of offering assistance to strangers. I noticed, while traveling and living there, that China does not seem to have a very vibrant culture of Samaritanism. When I asked Chinese people about this, they unerringly told me the Parable of the Nanjing Judge. Around 2006 an unnamed Nanjing judge “made headlines . . . when he blamed a good Samaritan for knocking an old lady over in the street because ‘common sense’ meant only the guilty help the injured.”¹⁰⁶ By one account:

[A] young person named Peng Yu . . . kindly helped up an old woman who had fallen down, and at the request of the old woman took her to the hospital. The result was that this old woman then maintained that it was Peng Yu who [was] the person who had knocked her down. Peng Yu strongly denied that he knocked over the old woman. Both sides eventually went to court and Peng Yu was fined in the first instance to bear a portion of the old woman’s medical expenses [sic], totally [sic] over 40,000 yuan, on the basis “common sense” that: “According to society’s logic/reason, if Peng Yu was doing a good deed, Peng Yu could have let the old woman’s family send her to the hospital after they arrived, and then leave on his own. However Peng Yu did not make such a choice, and his actions contradict what is reasonable”; “Peng Yu, on the day of the incident, paid the old woman over 200 yuan and even did not request that the old woman pay him back”; etc.¹⁰⁷

This incident triggered massive online discussions, with one website’s blog homepage claiming that a survey had ascertained that 80% of bloggers had chosen not to be good people anymore as a result.¹⁰⁸ This Nanjing judge story¹⁰⁹ continues to be invoked by some people in China to justify not helping strangers in distress; others raise it to call for changes in the culture. In 2011 a video of a two-year-old girl getting struck by a vehicle in a hit-and-run accident

province and remarried. In April 1994, the police found a body and determined it was She Xianglin’s wife and that he had killed her. She Xianglin said he was tortured for ten days and ten nights. Other well-known injustices include Du Peiwu’s case, Wu Daquan’s, Hutengjile’s, Zhang Zhenfeng’s, and Teng Xingshan’s. These and other cases continue to erode the Chinese people’s belief in their judiciary and government. Wrote Xu Xin, ‘Nie Shubin’s case might be the last straw that causes the judiciary to collapse.’”). See generally *id.*

¹⁰⁶ *Only the Guilty Help the Injured: Legacy of the “Nanjing Judge” All Too Apparent as Passers-By Ignore Hit-Run Toddler*, SYDNEY MORNING HERALD, Oct. 19, 2011, <http://www.smh.com.au/world/only-the-guilty-help-the-injured-legacy-of-the-nanjing-judge-all-too-apparent-as-passersby-ignore-hitrun-toddler-20111019-1m6sv.html>.

¹⁰⁷ Fauna, *Bystanders Only Help After Old Man Says He Fell by Himself*, CHINASMACK (Feb. 25, 2009), <http://www.chinasmack.com/2009/stories/bystanders-only-help-after-old-man-says-he-fell-by-himself.html>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

in China and then being ignored by more than a dozen passers-by as she lay critically injured on the road went viral and sparked another substantial round of online debate.¹¹⁰ In 2012 an American college student studying in China was broadly praised in the media and on social networking platforms because he bought some food for a poor old woman who was begging.¹¹¹ Chinese people again engaged in extensive discussions, sometimes exhorting each other to engage in similar small acts of kindness. But then in 2013 accounts of innocent women who got kidnapped and murdered after unadvisedly offering assistance to criminals who faked distress were widely publicized, with the clear message that helping strangers can be a very risky endeavor.¹¹² Whether any part of this debate is being steered by the CPC is not known, but certainly a lot of diverse and passionate viewpoints have been on display, with little defense of the anonymous but government-employed CPC member Nanjing Judge.

What the CPC will not tolerate are targeted efforts to foment revolution or otherwise undermine Party authority. It's generally understood that unauthorized coordinated outdoor gatherings are forbidden, and are met with

¹¹⁰ See *Apathy Toward Injured Child Sparks Public Outcry in China*, XINHUA (Oct. 17, 2011), http://news.xinhuanet.com/english2010/china/2011-10/17/c_131196451.htm; Joshua Norman, *After Toddler Is Left To Die, China Disquieted*, CBS NEWS (Oct. 17, 2011, 9:51 PM), http://www.cbsnews.com/8301-503543_162-20121691-503543.html; *Outcry in China over Hit-and-Run Toddler Left in Street*, BBC NEWS (Oct. 17, 2011), <http://www.bbc.co.uk/news/world-asia-pacific-15331773>; *Toddler's Survival Unlikely*, CHINA DAILY, Oct. 17, 2011, http://china.org.cn/china/2011-10/17/content_23641415.htm.

¹¹¹ See Anthony Bond, *American Becomes Chinese Internet Sensation After Buying Homeless Woman French Fries on Street (Shame She Didn't Like Them!)*, MAIL ONLINE (June 1, 2012), <http://www.dailymail.co.uk/news/article-2153119/American-Chinese-internet-sensation-buying-homeless-woman-French-fries-street-shame-didn-t-like-them.html>; Jonathan Kaiman, *American a Hero in China After Giving Homeless Woman French Fries*, L.A. TIMES, May 9, 2012, http://latimesblogs.latimes.com/world_now/2012/05/beijing-an-american-student-in-nanjing-has-shot-to-fame-on-the-chinese-internet-after-buying-a-pack-et-of-mcdonalds-french.html; *US Student Becomes Viral Hit in China for Sharing His Fries*, MSN NOW (June 6, 2012), <http://now.msn.com/us-student-becomes-viral-hit-in-china-for-sharing-his-fries>; cf. *China Rape Victim's Mother Begins Court Case*, GLOBALPOST (Apr. 12, 2013), <http://www.globalpost.com/dispatch/news/afp/130412/china-rape-victims-mother-begins-court-case>.

¹¹² See Michelle Florcruz, *Attack and Murder of Chinese Teenager Draws Additional Fears of Being a Good Samaritan*, INT'L BUS. TIMES (Aug. 1, 2013, 12:55 PM), <http://www.ibtimes.com/attack-murder-chinese-teenager-draws-additional-fears-being-good-samaritan-1368447> ("Wednesday, news broke of a teenager in China who was lured by a pregnant woman pretending to be in distress, only to later be assaulted and murdered by the woman and her husband. The story hit local Chinese media a day before the southern city of Shenzhen rolled out a new 'Good Persons Law,' which protects those who opt to be a Good Samaritan and help others. The episode will likely fuel China's growing phobia of helping strangers." (citation omitted)); see also Fauna, *Pregnant Wife Cons Young Girl for Husband's Sexual Needs*, CHINASMACK (Aug. 1, 2013), <http://www.chinasmack.com/2013/stories/pregnant-wife-cons-young-girl-for-husbands-sexual-needs.html>; Liu Yuanhui, *Girl Killed After Attempted Rape*, CRIENGLISH.COM (Aug. 1, 2013), <http://english.cri.cn/6909/2013/08/01/2561s779363.htm>.

violence and arrests, because in 1989 the world watched the CPC respond repressively to the Tiananmen Square Uprising, until the government seized all of the cameras and evicted or arrested the reporters. What is less widely recognized is that smaller scale protests occur in some part of China every day. Because the mainstream media in China is controlled by the CPC, these incidents are not reported by the domestic press, but information about at least some of them makes its way into foreign newspapers, or is succinctly and somewhat opaquely communicated via social media platforms. I personally witnessed several large demonstrations that resulted in the appearance of numerous police cars in Shanghai, Beijing, Urumqi, Chengdu and Hangzhou. Because I could not read Chinese, and was afraid to take pictures or approach strangers to ask questions, I don't have a good sense of what most of the disputes were about. I know that at least one was related to religion and two to land disputes with the government. One involved the death of a man while he was in police custody. They were not covered in the English versions of the Chinese press or in any international press venue as far as I could ascertain. In every case protesters were unambiguously dispersed or taken into custody by authorities. The CPC seems determined to prevent mass gatherings of people in furtherance of common goals, regardless of what the goals may be. There are even large contingents of People's Liberation Army soldiers at Chinese athletic events, apparently there to make sure the crowds in attendance are not diverted to other purposes, while public safety issues are addressed by local police officers.

All this obviously does not dissuade everyone from activism, though. By one account there are 180,000 "mass incidents" of protest every year.¹¹³ In the autumn of 2011 an entire fishing village in Guangdong province, Wukan, rose in insurrection and drove CPC officials out of its borders to protest violence and corruption related to confiscations of land, and remained in conflict with the government for months.¹¹⁴ This affair was not mentioned by official Chinese news outlets while it was happening, and references to it were censored from the Internet, but everyone I spoke to in China seemed to know about it. The Communist Party Secretary who had an office and leadership position in the law school where I was posted (Tongji University Law School) was away during this interval, reportedly involved with negotiations in Wukan by some accounts, but he relayed a different reason to me for his absence, which had required him to cancel a visit to his son's school he had scheduled for me. After the situation was defused, however, the problem was publicly attributed to corrupt actions by bad apple CPC officials acting outside the scope of their authority.¹¹⁵ Once the central government in Beijing was made aware of the

¹¹³ Malcolm Moore, *Inside Wukan: The Chinese Village That Fought Back*, TELEGRAPH, Dec. 13, 2011, <http://www.telegraph.co.uk/news/worldnews/asia/china/8954315/Inside-Wukan-the-Chinese-village-that-fought-back.html>.

¹¹⁴ *Id.*

¹¹⁵ See Amy Silverstein, *Wukan Rebellion: China Punishes 20 Officials in Response to Village Protest*, GLOBALPOST (Apr. 24, 2012), <http://www.globalpost.com/dispatch/news/re>

situation, the CPC account averred: it was rectified.¹¹⁶ Accepting this official account of events was probably a very savvy move on the part of the people of Wukan. I do not know if there were later repercussions.

There are smaller and subtler acts of protest as well. Many times as I entered or left the gates of Tongji University during the 2011–2012 academic year I passed by people in small groups or alone who held handmade posters and handed out papers expressing some political view or personal grievance. In one instance I was informed by several students that protesters were expressing opposition to the Communist Party Secretary in residence at Tongji University Law School, though on what basis I do not know, because the students I asked were unwilling to discuss the details with me beyond saying, “They do not think he is good.”

On one occasion I took a group of about thirty Tongji law students to the U.S. Consulate in Shanghai to observe rounds of a moot court competition being held there. A law school faculty member also accompanied us, naturally. We all took the subway together and then as we walked to the appropriate building several students suggested that group photos be taken. Everyone lined up on some stairs, and students asked a passing stranger to take some pictures so that everybody could be in them. As she was working her way through the numerous cameras lined up at her feet, a police officer appeared and ordered us to disperse. The law professor who had come along began walking toward him to explain who we were and what we were doing there, but before he had a chance the woman juggling the cameras yelled in a stentorian voice, “We are citizens of Shanghai and we can stand on the sidewalk and take photos if we want to!” Or at least I was told that is what she shouted by my students, while they cheered and burst into applause at these unexpected words of resistance, just as a group of students being pointlessly hassled by a police officer in the United States might do. It was a small and unexpectedly emotional moment of bonding across cultures that I will never forget.

On a far less happy or inspiring note, in July of 2013 a man set off a bomb in the Beijing airport. The *New York Times* account of the incident stated in pertinent part:

According to documents posted on the Internet, Mr. Ji, who had earned his living transporting people on a motorcycle, was paralyzed from the waist down in 2005 after security officers in the southern city of Dongguan beat him for operating an unlicensed transport service. In a petition letter detailing his

gions/asia-pacific/china/120424/wukan-rebellion-china-punishes-20-officials-response; Steven Jiang, *Symbol of Wukan Rebellion Ends Her Political Career*, CNN (Mar. 5, 2012), http://articles.cnn.com/2012-03-04/asia/world_asia_china-wukan_1_village-political-career-communist-party?_s=PM:ASIA.

¹¹⁶ See Silverstein, *supra* note 115; Jiang, *supra* note 115.

plight, Mr. Ji said he had been left with \$16,000 in medical bills. "Almost without hope, petition road endless," he wrote at one point.¹¹⁷

The article is a lot more sympathetic toward the accused bomber than one typically witnesses in an article about what might reasonably be characterized as an act of terrorism. Official Chinese accounts were quite different, equivocating about whether his injury was caused by a beating or an unrelated motorcycle accident, and whether he had received justice from the Chinese legal system.¹¹⁸

Now consider another stunning example of political protest involving the rigging of financial markets:

China experienced a bizarre numerological happening [on June 4, 2012]. The Shanghai Composite Index started [the] morning at 2346.98, which, when read from right to left, shared an uncanny similarity to [the day's] highly sensitive anniversary: twenty-three years since the June 4, 1989, crackdown on pro-democracy demonstrations in Beijing, an event known in Chinese as "six-four."¹¹⁹

The possibility that this was a coincidence seemed small indeed when six hours later, the numbers struck again, and the market closed the day down 64.89 points.¹²⁰ Sitting in my apartment in Shanghai while this unfolded, I couldn't decide which was more remarkable, the fact that someone had probably risked her life to make a political point by manipulating the market, or the fact that the market was hackable generally, which was surely very alarming to investors who couldn't care less about China's long term prospects for democracy. References to the Shanghai Stock Exchange, the Shanghai Composite Index and

¹¹⁷ Andrew Jacobs, *Former Motorcycle Driver, Paralyzed in Beating, Sets Off Bomb at Beijing Airport*, N.Y. TIMES, July 20, 2013, http://www.nytimes.com/2013/07/21/world/asia/former-motorcycle-driver-paralyzed-in-beating-sets-off-bomb-at-beijing-airport.html?_r=0.

¹¹⁸ Zheng Caizong & An Baijie, *Guangdong To Probe Airport Bomber's Allegations*, CHINA DAILY, July 22, 2013, http://usa.chinadaily.com.cn/china/2013-07/22/content_16808897.htm; *Beijing Airport Bomber's "Mistreatment" Case Reopened*, S. CHINA MORNING POST (July 22, 2013), <http://www.scmp.com/news/china/article/1287995/beijing-airport-bombers-mistreatment-case-reopened>; Li Qian, *Early Warning from Beijing Bomb Man*, SHANGHAI DAILY, July 22, 2013, <http://english.sina.com/china/2013/0721/610743.html>.

¹¹⁹ *What Happened on the Shanghai Stock Exchange?*, NEW YORKER (June 5, 2012), <http://www.newyorker.com/online/blogs/evanosnos/2012/06/what-happened-on-the-shanghai-stock-exchange.html> (emphasis omitted).

¹²⁰ See NTDTV, *Bizarre Stock Market Numbers "Commemorate" China's Tiananmen Massacre*, YOUTUBE (June 4, 2012), <http://www.youtube.com/watch?v=j479cl82OSg>; *What Happened on the Shanghai Stock Exchange?*, *supra* note 119; Keith Bradsher, *Market's Echo of Tiananmen Date Sets Off Censors*, N.Y. TIMES, June 4, 2012, <http://www.nytimes.com/2012/06/05/world/asia/anniversary-of-tiananmen-crackdown-echos-through-shanghai-market.html?pagewanted=all>.

many related terms were reportedly censored from Chinese Internet. Unlike during the Wukan event, where I was thrown off the Internet every time I searched for related information while the protest was unfolding, I was able to follow the story in real time using my Virtual Private Network (VPN) for a few hours, before the filtering became more effective. I wondered whether my students knew anything about this, but it was not the sort of thing I asked them about and none of them raised it. I did inquire of one of my faculty monitors, who confirmed that he was aware it had happened, but quickly changed the subject.

Finally, high profile Chinese dissidents such as artist Ai Weiwei risk their lives and those of their families and friends by openly criticizing the Chinese government. Ai Weiwei has a high enough profile that the CPC seems reluctant to permanently remove him from public view.¹²¹ The same is not true for his friends, however, several of whom are “missing.”¹²² His lawyers have also been detained incommunicado, or worse, to prevent them from effectively representing Ai Weiwei on tax charges and other matters.¹²³ Practitioners of Falun Gong similarly put themselves at risk, as is evidenced by this CPC-sanctioned report of Falun Gong being arrested for faking torture photos.¹²⁴ Readers are clearly supposed to conclude that any evidence of physical abuse proffered by Falun Gong has been fabricated, and also to absorb the more

¹²¹ See generally *Ai Weiwei*, N.Y. TIMES, Aug. 12, 2013, http://topics.nytimes.com/top/reference/timestopics/people/a/ai_weiwei/index.html.

¹²² See Tiffany Ap, *Four of Ai Weiwei's Friends Have Also Been Missing for Weeks New Reports Say*, SHANGHAIIST (May 23, 2011, 3:30 PM), http://shanghaiist.com/2011/05/23/four_of_ai_weiweis_friends_have_als.php; *Concern for Missing Chinese Artist Ai Weiwei*, AL JAZEERA (Apr. 5, 2011, 8:46 AM), <http://www.aljazeera.com/news/asia-pacific/2011/04/20114565222165221.html>.

¹²³ See Adam Martin, *Lawyer for Ai Weiwei Is Released from Detention*, ATLANTIC WIRE (Apr. 19, 2011), <http://www.theatlanticwire.com/global/2011/04/lawyer-detained-chinese-artist-emerges-hiding/36839/> (“The attorney, Liu Xiaoyuan, is one of a handful of notable Chinese lawyers who have disappeared since February, according to the *Guardian*. ‘Some of those, including Teng Biao, Li Tiantian and Liu Shihui, are still unaccounted for. Others are thought to have had their movements restricted.’”); *Ai Weiwei Arrest: Chinese Lawyer and Designer Are Latest To Disappear*, GUARDIAN, Apr. 15, 2011, <http://www.guardian.co.uk/world/2011/apr/15/ai-weiwei-lawyer-designer-disappear>; *Ai Weiwei's Lawyer Was Missing as the Tax Hearing Approaches*, GLOBAL VOICES (June 21, 2012), <http://globalvoicesonline.org/2012/06/21/ai-weiweis-lawyer-was-missing-as-the-tax-hearing-approaches/>; cf. Melissa Chan, *Chatting with China's Security Apparatus*, AL JAZEERA (Mar. 8, 2012), <http://blogs.aljazeera.com/blog/asia/chatting-chinas-security-apparatus> (“Al Jazeera’s team decided to speak to rights attorney Pu Zhiqiang, known for his work representing Ai Weiwei and himself an object of frequent police surveillance, to solicit his opinion. What happened next was not surprising, but on this day, felt particularly ironic: plainclothes police officers prevented us from interviewing Pu on camera, even as we explained to them that this new legislation would curtail their state security powers.”).

¹²⁴ *16 Falun Gong Practitioners Arrested*, SHANGHAI DAILY, June 4, 2013, <http://www.shanghaidaily.com/national/16-Falun-Gong-practitioners-arrested/shdaily.shtml>.

generalized information that depicting torture online and blaming the government for it may bring one into conflict with the authorities.

Most experts believe that the only way China will become more democratic is via reforms within the CPC, rather than from outside pressure.¹²⁵ Chinese leaders are unable to prevent events that pressure them to make changes, but they can control the flow of information about these events to a surprising degree, and they will not relinquish any of their power over communications lightly. They may, if sufficiently motivated, decide to wield this power to create more privacy within the culture, or simply to create a greater illusion of privacy. But their self-protective instincts are very strong.

C. Individual Concerns

As noted above, Chinese law provides a right of reputation such that “[i]f a citizen’s right of personal name, portrait, reputation or honour is infringed upon, he shall have the right to demand that the infringement be stopped, his reputation be rehabilitated, the ill effects be eliminated and an apology be made; he may also demand compensation for losses.”¹²⁶ There are accounts in the Chinese media of private citizens prevailing in court over those who had lied about them. Usually the facts in these reports are fairly extreme and somewhat improbable; such as one in which a person was accused of causing an accident when in fact he had rendered first aid to someone who was hurt and even got injured himself in the process of assisting the victim.¹²⁷ Stories like this are understood by Chinese citizens to be cautionary tales intended to influence behavior. In this case, the message is that liars are found out and punished, so people should not be dishonest. It also serves as a rhetorical justification for proactive censorship; since spreading lies publicly would have only hurt an innocent party.

Other times the cases seem real, as with this report:

China’s landmark [Internet privacy] case occurred in 2008 after the “death blog” of a woman named Jiang Yan. Her blog depicted the sorrow she felt about her husband Wang Fei’s extramarital affair. Jiang later killed herself, leading to outrage at Wang Fei on the Chinese Internet, prompting a Human Flesh Search. The search dug up his personal information and place of employment, leading to public harassment and offline protests that caused Wang Fei to lose his job. After Wang sued popular websites Daqi.com, Tianya.com, and a netizen named Zhang Leyi for emotional distress, a court

¹²⁵ For example, see the body of works on China by James Fallows, Peter Hessler, Evan Osnos and Jeffrey Wasserstrom. See generally WASSERSTROM, *supra* note 89.

¹²⁶ Jingchun, *supra* note 2, at 658.

¹²⁷ See *id.* at 657 (discussing the Wang example).

ruled in favor of Wang and ordered Daqi.com and Zhang to pay out 8,000 RMB (about US \$1,160).¹²⁸

The publication of this potentially verifiable story seems to be a warning against public vigilantism, which is an increasing concern of the CPC, especially when it is related to accusations of corruption by CPC members. The CPC would prefer to police its own members outside the view of the public, but understandably hesitates to say this directly.

Individuals within the CPC leadership clearly understand the importance of privacy generally, and most particularly to themselves. Status, power and “face” (reputation) are matters of acute personal concern. Individual criticisms are very deeply feared by party leaders. It is said that “in ancient Chinese society, the rights enjoyed by a person were accorded in relation to one’s social status and one’s status in the family system.”¹²⁹ Certainly CPC leaders enjoy the practical ability to control communications about themselves far more than most Chinese. They can also punish speakers who displease them. By some accounts, the harshness of the response to the Tiananmen Uprising was driven by anger over personal attacks against Deng Xiao Ping and other leaders in the chants and slogans used by protesters.

One internet researcher determined that the largest share of blocked words on China’s largest social media platform are the names of CPC members. “[P]rotection from criticism on Weibo seems to be a perk for rising up the ranks” of the Communist Party, he concluded.¹³⁰

Much more recently, *Bloomberg News* and *Business Week* were blocked from Chinese Internet after reporting on the extensive wealth of Xi Jinping’s family in the Spring of 2012.¹³¹ The *New York Times* was blocked in October of 2012 after publishing reports about the exorbitant wealth of Wen Jiabao’s family.¹³² The conclusion that family wealth is something these men did not want to have disclosed is inescapable. The reasons why this information is viewed as sensitive are not hard to guess, as the reported facts surrounding the acquisitions of these vast fortunes suggest political corruption.

¹²⁸ Vincent Capone, *In Chinese Netizen Outrage, Echoes of Mao-Era Struggle*, TEA LEAF NATION (Sept. 4, 2012), <http://www.tealeafnation.com/2012/09/in-chinese-netizen-outrage-echoes-of-mao-era-struggle/>.

¹²⁹ WANG, *supra* note 43, at 37.

¹³⁰ JASON Q. NG, BLOCKED ON WEIBO: WHAT GETS SUPPRESSED ON CHINA’S VERSION OF TWITTER (AND WHY) xviii (2013).

¹³¹ *Bloomberg Sites Blocked in China Days After Xi Family Wealth Story*, REUTERS, July 4, 2012, available at <http://www.reuters.com/article/2012/07/04/us-china-censorship-bloomberg-idUSBRE86306820120704>; *China Blocks Bloomberg Site After Report on Leader*, BLOOMBERG BUSINESSWEEK (June 29, 2012), <http://www.businessweek.com/ap/2012-06-29/china-blocks-bloomberg-site-after-report-on-leader>.

¹³² Keith Bradsher, *China Blocks Web Access to Times After Article*, N.Y. TIMES, Oct. 25, 2012, <http://www.nytimes.com/2012/10/26/world/asia/china-blocks-web-access-to-new-york-times.html>; WANG, *supra* note 43, at 92.

Previous negative reporting about China by these news organizations had been more general, and (apparently) less objectionable, but also fairly extensive. All three of those outlets had reported about hot button topics including Tiananmen, Tibet, Taiwan, Falun Gong, Wukan, the Bo Xilai scandal in Chongqing and the Shanghai Stock Market weirdness without overarching repercussions (though of course individual articles were blocked from distribution). It was only after the exhaustively researched financial information about the families of the incoming Chinese President and outgoing Chinese Premier was reported that the entire publications became Internet blockaded on a wholesale basis. And from what I hear from my friends in China, the censorship was unusually effective. Educated, politically savvy people knew something big had happened, but they had a really hard time figuring out what it was.

CPC leaders also want privacy when using their own phones and computers, and worry about having their own communications monitored. By some accounts Bo Xilai, former leader of Chongqing province and rising star in the CPC, sealed his political downfall and doom by carrying out his own surveillance campaign of people in the CPC leadership.¹³³ The watchers do not like to be watched. Part of the reason Google was banned from Chinese Internet was the impression that the company was inadequately controlling search results that broadcast private information about CPC leaders and their families.¹³⁴

IV. CENSORSHIP, COUNTERFEITING AND CONSUMER PRIVACY

The Chinese media is, as explained above, widely known to be controlled by the Chinese government. The Chinese people assume that is also true in nations like the United States because that is what they are told. Stories from the United States about gun violence dominate the Chinese media's international coverage, and Chinese citizens believe this is the tip of a massive undisclosed iceberg of violence in the United States, as would be the case in China, where crime stories are significantly underreported for politically instrumental reasons. Many Chinese people assume they will see gunfights if they visit the United

¹³³ See Ian Johnson & Jonathan Ansfield, *Key Figure in Scandal That Felled Bo Xilai Is Charged*, N.Y. TIMES, Sept. 5, 2012, <http://www.nytimes.com/2012/09/06/world/asia/key-figure-in-bo-xilai-scandal-is-charged.html?hp> ("The report also contended that Mr. Wang abused power by illegally spying on people. Sources have said the tech-savvy Mr. Wang wiretapped a wide range of people, including top government leaders, with Mr. Bo's approval.").

¹³⁴ James Glanz & John Markoff, *Vast Hacking by a China Fearful of the Web*, N.Y. TIMES, Dec. 4, 2010, <http://www.nytimes.com/2010/12/05/world/asia/05wikileaks-china.html?pagewanted=all> ("But Chinese officials became alarmed that Google still did less than its Chinese rivals to remove material Chinese officials considered offensive. Such material included information about Chinese dissidents and human rights issues, but also about central and provincial Chinese leaders and their children—considered an especially taboo topic, interviews with people quoted in the cables reveal.").

States. Of course, some visitors from China do. And having lost two family members to gun violence, I am not really inclined to defend the United States on this issue. But the Chinese media does manipulate coverage of shootings in the United States to maximize their visceral impact.

Yet against this backdrop of censorship and media distortions, reports in Chinese media of police crackdowns on the counterfeiting of trademarked and copyrighted goods are frequent, as are journalistic accounts of Chinese companies litigating intellectual property disputes in Chinese courts. The government does this for some end, but it is not clear that reducing counterfeiting is the actual goal. Counterfeit markets operate openly in every Chinese city I visited, and students routinely used unauthorized photocopies or PDF files in the place of textbooks at every university where I gave lectures. My impression is that the CPC is trying to signal internationally that it is complying with its treaty obligations, without actually changing the extremely profitable counterfeiting culture of China to any substantial degree. Certainly some of my students thought that foreign companies were given unfair advantages in the Chinese courts, based on news reports that foreign companies prevailed in the majority of intellectual property related court cases that resulted in verdicts.¹³⁵ They acknowledged, though, that assertions of disproportionate legal success by foreigners could not be verified by a list of cases or by any other relevant criteria. Perhaps the news accounts which said that foreigners were successfully defending their intellectual property rights in China were themselves supposed to motivate future intellectual property law compliance. This is not to suggest, however, that the Chinese government is all talk and no

¹³⁵ See Zhao Wen, *Foreign Firms Winning Most Infringement Trials*, SHANGHAI DAILY, Apr. 26, 2012, <http://www.shanghaidaily.com/Metro/society/Foreign-firms-winning-most-infringement-trials/shdaily.shtml> ("About 86 percent of foreign companies won their lawsuits over infringement of their intellectual properties in Shanghai last year, according to a white paper released by the Shanghai Higher People's Court yesterday. According to the paper, Shanghai courts settled 147 foreign-related infringement cases that went to trial last year, with more than 71.16 million yuan (US\$11.29 million) involved. Judges ruled on 65 cases with 56 in favor of foreign companies, the paper said. In one case, Diageo, the maker of Johnnie Walker, won 120,000 yuan compensation from two Chinese companies that used the Scotch whisky's name on their olive oil skin-care products. Last year, Shanghai courts accepted 174 infringement cases involving parties from Hong Kong, Macau, Taiwan and foreign countries such as the United States, France and Japan. The number was 16.3 percent lower than in 2010."); cf. Esther H. Lim & C. Brandon Rash, *China Court Swiftly Enforces U.S. Company's IP Rights Against Chinese Company in Motorola v. Guangzhou Weierwei*, LEXIS NEXIS CHINA LEGAL REV., Mar. 2008, available at <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=ac1bec74-c483-4f26-8202-e603d78626fa>; *More Foreign Companies Involved in China IPR Suits*, CHINA POST (July 16, 2013), <http://www.chinapost.com.tw/business/asia-china/2013/07/16/383812/More-foreign.htm> (discussing the increase in intellectual property lawsuits involving foreign companies); Brian Safran, *Challenging the Presumption that China Is Weak on Intellectual Property*, ATLANTIC-COMMUNITY.ORG (July 5, 2010), http://archive.atlantic-community.org/index/articles/view/Challenging_the_Presumption_that_China_is_Weak_on_Intellectual_Property.

action, when it comes to controlling foreign creative works, as will be seen below.

A. Chinese Censorship Affects Film Content Worldwide

Consider the case of foreign movies. Movies from the United States and other nations are actively censored by CPC actors. If particular movies are not authorized for distribution by the Chinese government, they cannot be lawfully shown in theaters in China, and the only copies that circulate are illegal in a criminal law sense as well as unauthorized in a copyright law sense. The Chinese government selects only thirty-four foreign films for domestic distribution each year.¹³⁶ The censorship guidelines of China's State Administration of Radio, Film and Television include:

[P]rohibitions against "disturbing social orders and harming the social stability," "violations against the fundamental principle of the Constitution," and "promoting obscenity, gambling and violence."

The rules also forb[id] content such as "murders, violence, horrors, ghosts and demons, supernaturalism . . . value orientations confusing the real and the fake, the innocent and the evil, and the beautiful and the ugly."¹³⁷

China is a market that can generate \$50 million in revenues for a popular movie.¹³⁸ Films that offend the government censors for any reason have no chance of being officially distributed in China.¹³⁹ For this reason producers who hope to have films on China's approved list will engage in substantive edits and rewrites to please the CPC censors in Beijing.¹⁴⁰ For example:

When aliens besiege Earth in Universal Pictures' recent action film "Battleship," it is the Chinese authorities in Hong Kong whom Washington credits with delivering the early proof that these invaders aren't exactly homegrown.

But those aren't the only Chinese do-gooders on screen these days.

¹³⁶ Mark McDonald, *Beijing's Censors Could Test the Mettle of Iron Man*, N.Y. TIMES BLOG (July 17, 2012, 12:32 AM), http://rendezvous.blogs.nytimes.com/2012/07/17/beijings-censors-could-test-the-mettle-of-iron-man/?_r=0.

¹³⁷ Steven Zeitchik & Jonathan Landreth, *Hollywood Gripped by Pressure System from China*, L.A. TIMES, June 12, 2012, <http://articles.latimes.com/2012/jun/12/entertainment/la-et-china-censorship-20120612>.

¹³⁸ McDonald, *supra* note 136 ("One film-industry expert said Chinese moviegoers can bump a film's box-office receipts by as much as \$50 million.").

¹³⁹ Cf. Patrick Brzeski, *China's Looming Entertainment Problem: Not Enough Lawyers*, HOLLYWOOD REP. (June 21, 2013), <http://www.hollywoodreporter.com/thr-esq/chinas-looming-entertainment-problem-not-572629>.

¹⁴⁰ See McDonald, *supra* note 136 ("With fewer than three dozen foreign films allowed onto mainland screens each year, there is tremendous competition among studios and filmmakers to get on the approved list. They do this by pleasing (or not offending) the censors in Beijing. Hence the edits and the rewrites.").

In “Salmon Fishing in the Yemen,” a romantic comedy about building a dam in the Mideast, Chinese hydroelectric engineers showed off their know-how; the original book included no such characters. In Columbia Pictures’ disaster movie “2012,” the White House chief of staff extolled the Chinese as visionaries after an ark built by the country’s scientists saves civilization.

In fact, references to the Middle Kingdom are popping up with remarkable frequency in movies these days. Some are conspicuously flattering or gratuitous additions designed to satisfy Chinese business partners and court audiences in the largest moviegoing market outside the U.S. Others, filmmakers say, are simply organic reflections of the fact that China is a rising political, economic and cultural power.

Meanwhile, Chinese bad guys are vanishing—literally. Western studios are increasingly inclined to excise potentially negative references to China in the hope that the films can pass muster with Chinese censors and land one of several dozen coveted annual revenue-sharing import quota slots in Chinese cinemas.

MGM, the studio behind the remake of the 1984 movie “Red Dawn,” last year digitally altered the invaders attacking the U.S. to make them North Koreans instead of Chinese, as originally shot.¹⁴¹

Even if a foreign film, or one made by foreign entities in partnership with Chinese firms, is allowed into distribution, it still may be a specially censored version of the work, with the original version accessible only via unauthorized means.¹⁴² Chinese movie fans may well go to Chinese movie theaters with the expectation that they will be viewing an edited-for-China film.¹⁴³ U.S. movies are sometimes very popular with Chinese theatergoers nonetheless.¹⁴⁴

If a foreign film is not one of the approved thirty-four movies, it can only be viewed in China as a (probable¹⁴⁵) act of copyright infringement, via illegal download, or bootleg DVD. While the Chinese government will affirmatively keep large numbers of foreign films away from Chinese citizens by refusing to allow them into authorized distribution, it is much less likely to take action to

¹⁴¹ Zeitchik & Landreth, *supra* note 137.

¹⁴² *See id.*

¹⁴³ *See id.* (“A few years ago, comments on Chinese pop culture website douban.com and movie review site MTime.com regularly reflected the game of ‘gotcha’ that Chinese film fans played with censors. People would buy pirated discs or download uncensored versions of Hollywood films, then comment online about what was missing from the versions in Chinese theaters.”).

¹⁴⁴ In 2012, Hollywood took 50% of Chinese ticket sales for the first time, based on only twenty releases. Dan Harris, *Media Piracy and the End of Chinese Cultural Exceptionalism? Part 2 of 3: What Everyone Wants*, CHINA L. BLOG (July 13, 2013), <http://www.chinalawblog.com/2013/07/media-piracy-and-the-end-of-chinese-cultural-exceptionalism-part-2-of-3-what-everyone-wants.html>.

¹⁴⁵ Unless it qualifies as fair use or some other exemption under Chinese law.

limit unauthorized distributions of unauthorized films via the Internet or counterfeiting networks.¹⁴⁶

When the government permits their distribution, it may authorize (in a copyright sense) uncut copies of foreign films to be purchased legitimately, but I could not ascertain whether this actually happens. Authorized movies reap income from theatrical release in China, but it is not clear that Chinese consumers prefer to purchase legal DVDs or downloads when that is an option, assuming it ever is an option.¹⁴⁷ This may be related to costs, and possibly also convenience if counterfeit DVDs are more easily obtained than legitimate ones, which was certainly my impression. In Shanghai counterfeit movie stores were common and carts vending counterfeit movies (and books and CDs) could be found on almost every street corner. At every university I visited in China counterfeit DVDs could be conveniently purchased right on campus. No one I asked, and I mean no one, knew where I could go to confidently purchase authorized, noninfringing copies of foreign movies.

Any preference by Chinese people for bootlegs of officially sanctioned movies as against authorized DVDs probably isn't typically directly linked to concerns about intellectual confidentiality or desires to have viewing preferences remain private. Once a film earns the approval of the government censors it seems unlikely that anyone would be judged negatively for watching it. It is possible, however, that someone known to watch only foreign films might in some circumstances be accused of lacking patriotism for failing to support domestic movies. But that is unlikely to be a serious problem, given the popularity of foreign brands of consumer goods in China generally.

Copyright infringement by consumers in the United States has sometimes been linked to a desire for privacy, when the unauthorized downloading or viewing of infringing content was mistakenly believed to be private in nature, particularly pornography. The U.S. government has almost no interest in policing online pornography as long as the performers are adults.¹⁴⁸ Pornographers, however, have created profitable business models based on identifying unauthorized downloaders of their pornography, and then suing them for copyright infringement.¹⁴⁹ Many of the downloaders settle quickly to avoid having their names published in association with pornography that may

¹⁴⁶ See Dan Harris, *The End of Chinese Cultural Exceptionalism? Part 3 of 3: Forget It, Jack, It's Chinatown*, CHINA L. BLOG (July 14, 2013), <http://www.chinalawblog.com/2013/07/the-end-of-chinese-cultural-exceptionalism-part-3-of-3-forget-it-jack-its-chinatown.html>.

¹⁴⁷ See Jacqui Cheng, *Paramount and Warner Bros. Market \$3 DVDs in China*, UNCATEGORIZED (Nov. 7, 2007, 2:27 PM), <http://arstechnica.com/uncategorized/2007/11/paramount-and-warner-bros-market-3-dvds-in-china/>.

¹⁴⁸ See Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 17 (2012) [hereinafter Bartow, *Copyright Law*]; Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 801 (2008).

¹⁴⁹ See Bartow, *Copyright Law*, *supra* note 148, at 3.

be violent or racist and often is both.¹⁵⁰ In China, pornography is illegal but informally tolerated.¹⁵¹ As with copyright infringement, one assumes the CPC has the tools to enforce the laws but lacks either the courage or the desire to do so.

B. *Uploading, Downloading and Piratical Diversions*

“Piracy” as a means to access unapproved foreign films does not seem to particularly worry the Chinese government. If it did, there would be a crackdown that would also have the salutary effect of demonstrating to countries like the United States that it was actively combatting copyright infringement. Because piracy tools also facilitate the distribution of unauthorized domestic movies and other cultural works that the CPC might prefer not to have in circulation, the CPC assuredly employs technical means to combat them. It simply chooses not to deploy them on behalf of foreign movie producers. One observer has written grandiloquently about the expressive empowerment possible through piracy:

In China’s cultural system that highly controls its information production and circulation, piracy not just [sic] provides easier and cheaper access to cultural goods, but in most cases, piracy offers *the only channel* for distributing a great amount of cultural works that are otherwise not allowed to be circulated and consumed. The Chinese movie audience is denied by China’s tight control cultural access not just to Hollywood entertainment limited by the tight quota system but also to a large number of independent domestic films that have been banned by censorship due to their often challenging political messages and alternative cultural contents. Piracy often functions as the only channel through which these censored films can be circulated and consumed. As a viral distribution circuit that can easily evade censorship, piracy, therefore, decentralizes the hegemony of state cultural control and potentially empowers those who are denied the right to access, as well as those who are deprived of

¹⁵⁰ See Claire Suddath, *Prenda Law, the Porn Copyright Trolls*, BLOOMBERG BUSINESSWEEK (May 30, 2013), <http://www.businessweek.com/articles/2013-05-30/prenda-law-the-porn-copyright-trolls>.

¹⁵¹ See James Griffiths, *A Brief History of Chinese Porn*, DANWEI (Aug. 24, 2011), <http://www.danwei.com/a-brief-history-of-chinese-porn/>; Brian Ashcraft, *What’s Bringing China and Japan Back Together? Pornography, Apparently*, KOTAKU E., <http://kotaku.com/5966171/whats-bringing-china-and-japan-back-together-pornography-apparently>; cf. Christopher Beam, *Is All Pornography Banned in China?*, SLATE (June 24, 2009), http://www.slate.com/articles/news_and_politics/explainer/2009/06/they_know_it_when_the_y_see_it.html; Monica Tan, *A Land Where Porn “Doesn’t Exist”*, DAILY LIFE (Oct. 4, 2012), <http://www.dailylife.com.au/news-and-views/news-features/a-land-where-porn-doesnt-exist-20121003-26yiy.html>.

the freedom to create. And this is piracy's biggest threat, or promise, in the contemporary cultural landscape of China.¹⁵²

But it is not clear at all that the observation that piracy "can easily evade censorship" is correct.¹⁵³ Additionally, my impression is that pirated works remain below the government radar more effectively in hard copy form than online, which would impede the speed and ease of distribution.

As explained above, the Chinese government uses undisclosed formulae to choose which foreign and domestic films will be allowed into theaters and authorized circulation. Though some may be rejected because their content is viewed as potentially culturally destabilizing, most probably fail to make the cut for much more mundane reasons and are not viewed as socially risky. The CPC is probably most invested in retaining overall control of commercial film distribution and likely pays a lot more attention (both observational and interventionist) to individuals who upload films with the intention of distributing them, than it does to individual downloaders, especially for nonthreatening films.

The CPC's efforts to curtail broad distribution of problematic films probably include technological tracking and filtering online, and real space identification and punishment of transgressors. Downloaders of these movies may be somewhat at risk, though not nearly as much as uploaders and hosts. Efforts to produce and/or virally distribute civically unacceptable independent films, whether foreign or domestic, is probably risky for all concerned, especially when attempted online.¹⁵⁴

Governmental monitoring of uploading activity and of web content hosting that is driven by political considerations could, and most assuredly would, simultaneously address copyright concerns if, like certain political messages, copyright infringement was viewed as a threat to social harmony. No dual censorship/copyright infringement focus by the CPC is in evidence, however.¹⁵⁵ Just the opposite. Relevant CPC activities seem focused only upon discouraging the making of new independent films with anti-government messages, and on preventing the distribution of currently existing ones. Downloads of these "dangerous" films may be tracked as well, but downloading is a far less effective distributional choke point than those offered by uploading and content hosting websites. My guess is that only people under official observation for

¹⁵² Jinying Li, *Piracy, Circulation, and Cultural Control in Contemporary China*, in 11 INDIA, RUSSIA, CHINA: COMP. STUD. ON EURASIAN CULTURE AND SOC'Y 99, 100 (Tetsuo Mochizuki & Shiho Maeda eds., 2012), available at http://src-h.slav.hokudai.ac.jp/rp/publications/no11/11-08_Li.pdf.

¹⁵³ *Id.*

¹⁵⁴ Cf. Kal Raustiala & Christopher Sprigman, *Fake It Till You Make It*, 92 FOREIGN AFF. 25, 25-26, 28 (2013), available at <http://www.foreignaffairs.com/articles/139452/kal-raustiala-and-christopher-sprigman/fake-it-till-you-make-it>.

¹⁵⁵ Cf. Brzeski, *supra* note 139.

some other reason have their copyright infringing downloads noted in any official manner.

Massive infringing downloads of unauthorized but “safe” foreign movies help meet the demand for affordable audiovisual entertainment, and divert popular contempt for the vapidness of authorized domestic film offerings.¹⁵⁶ The Chinese film industry relies on government subsidies for survival, leading one commentator to explain that the Chinese “cinema’s position—as both a political apparatus and a commodity—is a major problem for film producers, as they are faced with the impossible task of balancing profits with ideology.”¹⁵⁷ It’s much less of a concern for ordinary citizens who have robust unauthorized access to foreign films online to distract them. They would appear to have little to fear about engaging in “illegal” downloading or streaming activities their government has affirmatively chosen not to interfere with. I met many people in China with enormous libraries of unauthorized copies of foreign films, and none expressed any concern at all about copyright law.

V. THE APPEARANCE OF CONFLICT MEETS THE APPEARANCE OF FORCE

In July of 2009, after first demonstrating to the world that the Internet could be instantly turned off across vast swathes of its geography (and cellular phone service, too!), the PRC began applying preexisting censoring technologies colloquially referred to as “The Great Firewall of China” and “The Golden Shield” to block domestic access to social networking sites such as Facebook and Twitter.¹⁵⁸ A journalist writing in the *Economist* observed:

[W]ithin China’s borders the Communist Party has systematically put in place projects such as the Great Firewall, which keeps out “undesirable” foreign websites such as Facebook, Twitter and YouTube, and Golden Shield, which monitors activities within China. It has also worked closely with trusted domestic internet companies such as Baidu (a search engine), Tencent (an internet-services portal), Renren (China’s leading clone of Facebook) and Sina,

¹⁵⁶ See Laikwan Pang, *Piracy/Privacy: The Despair of Cinema and Collectivity in China*, 31 BOUNDARY 2, no. 3, 2004, at 101, 107 (“Today, the majority of China’s film companies relies less on the market than on government aid—which ranges from loans and financial awards to government mass ticket purchasing—for survival. As a result, the films produced have become more and more compliant with the official ideology, which further discourages Chinese productions that cater to the tastes and values of the masses.”). But see the recent success of one domestic movie. Sophie Lu, *In Box Office Hit, American Dream Is Still Alive—in a Maturing China*, TEA LEAF NATION (June 10, 2013), <http://www.tealeafnation.com/2013/06/in-box-office-hit-american-dream-is-still-alive-in-a-maturing-china/>.

¹⁵⁷ Pang, *supra* note 156, at 108.

¹⁵⁸ Sascha Segan, *Life Behind the Great Firewall of China*, PCMAG.COM (June 27, 2011), <http://www.pcmag.com/slideshow/story/266213/life-behind-the-great-firewall-of-china>.

an online media company that includes Weibo, a Twitter-like microblogging service.¹⁵⁹

Though in many respects China enjoys well-functioning domestic substitutes to Western social media platforms (Weibo, QQ, Weixin, Baidu, etc.), Chinese people are well aware of what they are missing (Facebook, Twitter, Google and others). The technologist who developed the Great Firewall is by one account among the most hated men in China.¹⁶⁰ When Fang Binxing announced his resignation from his post as the president of the Beijing University of Posts and Telecommunication as a result of health concerns, online comments about his resignation were very hostile.¹⁶¹

By far, the most popular comments that have been shared by thousands of netizens on Weibo (China's Twitter) are "Wish the illness can defeat you ASAP!" and "We are glad that you are gone [for good]!" Like one netizen 无聊史 cursed: "I hope Fang gets cancer and die [sic] soon." Another netizen 我们没有V made a similar wish: "May the illness take his life ASAP. All netizens are on the side of the illness. Please, take his life!"¹⁶²

China's "real name" Internet policy clearly prohibits anonymous web use, even though it has not been widely enforced. However, as far as I have been able to ascertain, there is no statutory law that illegalizes the use of blocked

¹⁵⁹ *China's Internet: A Giant Cage*, ECONOMIST (Apr. 6, 2013), <http://www.economist.com/news/special-report/21574628-internet-was-expected-help-democratise-china-instead-it-has-enabled>; see also Ke Steven Wan, *Internet Service Providers' Vicarious Liability Versus Regulation of Copyright Infringement in China*, 2011 U. ILL. J.L. TECH. & POL'Y 375, 398–99 ("There are two levels of censorship of Internet speech. First, the Chinese government controls what its citizens can see by filtering out information flowing through the Internet gateway, which connects China with the outside world. Second, because the Internet gateway does not prevent access to content already inside a domestic network, the Chinese government relies on the cooperation of regional ISPs to filter information that does not have to pass through the Internet gateway. The most prevalent forms of Internet filtering include Internet Protocol ('IP') address blocking and content filtering. IP address blocking refers to preventing users from accessing specific IP addresses. This would prohibit users from accessing any content on the blocked site whether or not the content is objectionable. Content filtering, however, is more finely grained and prohibits users from accessing any site containing certain keywords, phrases, or even images. The filtering technology can even allow the government to detect the forbidden words or other 'content' within the IP packets travelling between users' computers and targeted sites. Since the Chinese government spares no effort to regulate the Internet speech, an additional task of deterring copyright infringement should not dramatically increase the administrative costs.").

¹⁶⁰ *Father of the Great Fire Wall Resigns Due to Deteriorating Health, Chinese Netizens Wish Him an Early Death*, OFFBEAT CHINA (June 27, 2013, 8:05 PM), <http://offbeat.china.com/father-of-the-great-fire-wall-resigns-due-to-deteriorating-health-chinese-netizens-wish-him-an-early-death>.

¹⁶¹ *Id.*

¹⁶² *Id.*

foreign social networking sites. China tries to prevent access to them but does not officially forbid it. Recent reports suggest that despite the technological blocks in place, hundreds of thousands of Chinese citizens and domiciliaries are able to access (e.g.) Facebook regularly from inside China, and this author is one of them. I do it by using a Virtual Private Network (VPN), which at least in theory shields my computer activities from observation by my in-country ISP. While it would be nice to think I outsmarted the Chinese censorship machinery, VPNs are not exactly cutting edge and I feel confident that the CPC is aware they exist, and that they are being widely used within China. The legality of using VPNs there is murky, but if they were clearly forbidden, companies would not have any mechanism for engaging in what they believe are at least somewhat secure online communications, or for accessing blocked international pages they value, and they would leave China. For this reason, VPNs are tolerated. They may also be compromised, however; the Chinese government has a huge appetite for Internet surveillance and for the technological facility to spy undetectably. The functional privacy that VPNs actually offer users is contested. My own impression is that VPN users have a false sense of security. If VPNs are legally banned or it becomes evident that even sophisticated ones are easily breachable and often breached, the only semi-secure, semi-free online communications channel in China will be lost, and that would have far ranging repercussions for the Chinese economy.

VI. CONCLUSION

At present, the CPC is “allowing its citizens to benefit from the social and commercial aspects of the Internet, while placing strict limits on its use for political activism.”¹⁶³ Chinese leaders do not consider the Internet an unstoppable force for openness and democracy, so it will not be banned or restricted into disutility. In fact, quite the contrary: Various government organs are trying to harness the power of social networking overtly, by communicating with citizens online, and covertly through mechanisms like astroturfing and search engine optimization. Meanwhile, macro concerns about political control and individual concerns about reputation simultaneously drive widespread online monitoring and censorship by the CPC.

Everyone is aware of the high level of involvement the CPC has with online communications. As a result, VPNs are commonly deployed inside China. Some Internet users in China push back against it overtly, using the social media platforms available to them, while others try to evade monitoring and censorship by aggressively using technology or subterfuge or both in

¹⁶³ *How Does China Censor the Internet?*, *supra* note 81; cf. Rachel Lu, *Could One Chinese City Cut a Small Hole in the Great Firewall?*, TEA LEAF NATION (June 5, 2013), <http://www.tealeafnation.com/2013/06/could-one-chinese-city-cut-a-small-hole-in-the-great-firewall/>.

combination. None of this is technically illegal but efforts to limit online monitoring and filtering are unofficially battled quite effectively by the CPC.

At the same time, the Chinese government refuses to use its vast surveillance and control capabilities in the service of foreign copyright holders. This allows foreign entertainment products including books, movies, music and television programming to be widely distributed throughout China, even when they are officially censored or unauthorized, at low to no cost or risk to Chinese citizens. The CPC sees these media materials as opiates of the masses, rather than intellectual resources that are likely to spark revolution or dissent, and they are tacitly permitted to be consumed in great quantity as well as in relative privacy.

Much of the active governmental surveillance in China is directed at promulgating the CPC conception of social harmony. To effectuate this vision, only politically uncomfortable communications are sought out for censoring and silencing. This is sometimes done openly; other times it is at least detectable, and there is also the risk of silent listening. These activities are intended to hamper political activism and repress dissent, and they do. But they also prevent business entities from having either confidential communications or confidence in communications. Their negotiations, contracts, business activities, personal ledgers, trade secrets and financial information are constantly exposed to government agents. This would be problematic even if all CPC leaders were completely honest because business interests are sometimes in conflict with those of the government. When the well-documented tendency toward corruption of CPC minions is factored in¹⁶⁴ and the possibility exists that confidential information will be passed along to competitors, the situation becomes completely untenable for some ventures, hampering innovation generally and particularly repressing the ascension of Shanghai as a world financial center.¹⁶⁵

A *New York Times* reporter has recently observed, "China, the world's second-largest economy after the United States, has a huge influence on the world economy so the actions of its central bank are closely watched across the globe. But its financial and banking system remains opaque to Chinese and foreigners alike."¹⁶⁶ To grow this sector of its economy, China will need to simultaneously provide enough transparency for potential investors to have basic understanding of how Chinese markets operate, and adequate transactional privacy so that the same potential investors feel confident that they can keep their proprietary financial information sufficiently confidential. The CPC must balance demands for privacy with its longstanding concerns about

¹⁶⁴ See Chris Buckley, *China Answers One Question About Trial: A Date*, N.Y. TIMES, Aug. 18, 2013, http://www.nytimes.com/2013/08/19/world/asia/chinese-politician-to-stand-trial-for-corruption.html?_r=0.

¹⁶⁵ WANG, *supra* note 43, at 24.

¹⁶⁶ David Barboza, *Credit Warnings Offer World a Peek into China's Secretive Banks*, N.Y. TIMES, June 24, 2013, http://www.nytimes.com/2013/06/25/business/global/credit-warnings-give-world-a-peek-into-chinas-secretive-banks.html?hp&_r=1&.

social stability and personal anxieties about status, power and surreptitious wealth accumulation. Its successes and failures will be measured by future trends in foreign investment as well as by the openness and vibrancy of domestic Chinese artistic and political culture.

